ADMINISTRATIVE LAW BULLETIN • Vol. 9 • No. 3

JULY 1957

ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

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PROGRAM OF ANNUAL MEETING

New York, New York

Thursday, July 11

Le Perroquet Suite (4X and 4Y)—Waldorf-Astoria Hotel

10:00 A. M., 12:30 P. M. (luncheon) and 2:00 P. M.—Meetings of Council and Committee Chairmen. Place of luncheon to be announced.

Note: All Section members are invited to Council Meetings, and Committee Chairmen and Vice Chairmen are particularly urged to be present when reports of their respective Committees are considered by the Council.

Friday, July 12

Le Perroquet Suite (4X and 4Y)—Waldorf-Astoria Hotel

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Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

10:00 A. M.—General Section Session:

Preliminary Report of Nominating Committee and any other informal nominations.

Committee Reports.

Grand Ball Room, The Ambassador Hotel

2:00 P. M.—Joint Session With Section of Public Utility Law:

Discussion of Current Problems of Administrative Law and the Proposed Administrative Code

Harold L. Russell, *Chairman,* Section of Administrative Law and John B. Prizer, *member* Council of Section of Public Utility Law and Vice President and General Counsel, Pennsylvania Railroad Company, *presiding*

Guest Speakers—Presenting the Point of View of Regulated Industry

E. V. Rickenbacker, Chairman of the Board, Eastern Air Lines, Inc.

J. W. McAfee, President, Union Electric Company of Missouri.

Lawyer Speakers—Presenting the Point of View of the Bar

John W. Cragun, Washington, D. C.

Starr Thomas, General Attorney and Commerce Counsel, A. T. & S. F. Railway Company.

5:30 P. M.—Reception. (*Note*: This will be an informal occasion, arranged by the Section Development Committee, and will take place in Le Perroquet Suite, 4X and 4Y, Waldorf-Astoria Hotel. The ABA advance program had listed this occasion for Thursday, July 11. Please note the change in day.)

Saturday, July 13

Le Perroquet Suite (4X and 4Y)—Waldorf-Astoria Hotel

10:00 A. M.—General Section Session:

Formal report of Nominating Committee and any other formal nominations.

Conclusion of Committee Reports.

Any other and unfinished business.

Election of Officers and Council Members.

1:00 P. M.—Luncheon Meeting of 1956-1957 and 1957-1958 Council Members.

LONDON MEETING

This excellent program has been arranged jointly by the Section and particularly by E. Blythe Stason, Chairman of the Section's London Meeting Committee, and by the Society of Public Teachers of Law In England. It is hoped that a luncheon for all who attend the July 26 sessions may be arranged and announcement will be made at the opening of the morning session.

Friday, July 26

The Park Suite Grosvenor House

Harold L. Russell, *Section Chairman, Meeting Chairman*

10:00 A. M. and 2:00 P. M. General Session, E. Blythe Stason, *Chairman,* Section's London Meeting Committee, *presiding*

"Administrative Proceedings and Problems of Administrative Law in the United States, including the American Bar Association Revision Program," Ashley Sellers, Washington, D. C., Chairman of ABA Special Committee on Legal Services and Procedure.

"Administrative Proceedings and Problems of Administrative Law in Britain, including The Work of the Parliamentary Committee on Administrative Tribunals and Enquiries," Sir Oliver Franks, Chairman of the Parliamentary Committee.

"The Judicial View of Administration in Britain," Sir Cecil Carr, one-time Counsel, now retired, for the Speaker of the House of Commons.

Questions from the Audience and Panel Discussion to include such matters as Administrative Hearings, Confrontation of Parties with Evidence Against Them, The Administrative Court Idea, Judicial Review and Problems of Legal Education in the Field.

Members of the Panel:

Dean E. Blythe Stason, University of Michigan Law School, *presiding*

The Speakers and

Professor E. C. S. Wade, Cambridge University

Professor F. H. Lawson, Oxford University

An additional panel member will be an English lawyer active in Administrative practice

Robert M. Benjamin, New York, New York

Whitney R. Harris, Dallas, Texas

CHAIRMAN'S PAGE

This issue of the Bulletin will be the last issue for this year since the Annual Meeting is to be held in July. It contains not only materials usual in the last *Bulletin* but also an article on the Office of Administrative Procedure by Mr. J. Smith Henley, Director of that office, a resume of legislation of interest to Section members prepared by the National Committee, the proposed new Code of Federal Administrative Procedure prepared by the ABA's Special Committee, other materials of interest and, in this "Chairman's Page", a report on Section activity.

The Committee reports contained in this issue of the *Bulletin* are, in most part, subject to review by the National Committee which will make recommendations to the Council and to the Section with respect thereto. It is expected that the National Committee will submit its report to the Council prior to the first Council meeting in New York, Thursday, July 11, 1957 and that copies of that report will be available for all Section members in attendance at the New York meetings. Any member so desiring may forward comments on Committee reports to Mr. Arnold Levy, Chairman of the National Committee, Washington Building, Washington 5, D. C.

Nominating Committee—Following the spirit of the report of the Joint Committee on Organization and By-Laws, contained in this issue of the *Bulletin,* and conforming

with the present By-Laws as well, your Chairman hereby advises that he has asked the following to be the Nominating Committee to make nominations for the Officer and Council Member vacancies for 1957-1958:

E. Blythe Stason, Chairman, Hutchins Hall, University of Michigan

Reuben Hall, 75 Federal Street, Boston 10, Massachusetts

Frederic P. Lee, Ring Building, Washington 6, D. C.

The appointment of the Nominating Committee will be formally made at the first meeting of the Section, Friday morning, July 12, 1957, as required by the present By-Laws, and a report of the Committee, which will include the identity of the nominees and a brief statement of each nominee's activities in the Section and in the law profession generally, will be read at that time.

Your Chairman will ask for additional informal nominations at the Friday morning session and, at the opening of the Section meeting on Saturday, July 13, 1957, formal nominations by the Nominating Committee or by others will be made. The election will be the last business at that Session.

This procedure will give all an opportunity to express their views to the Nominating Committee and to express disagreement with the views of the Nominating Committee.

ABA Legislative Program Relative to Legal Services and Procedure

We are indebted to Ashley Sellers for the following notes:

The Special Committee on Legal Services and Procedure has completed the drafting of legislation to implement all of the resolutions adopted by the House of Delegates at its 1956 mid-year meeting, pursuant to the recommendations made by the Special Committee in its report to the House of January 31, 1956.

In early January, the Special Committee secured the introduction of legislation to provide for the establishment of an independent Office of Federal Administrative Practice; to provide for the establishment of Hearing Commissioners to replace present trial examiners; to establish a legal career service for government attorneys; and to provide for the control of representation and practice before Federal administrative agencies. S. 932, H.R. 3349 and H. R. 3350 (identical bills) contain these provisions. Within the past few weeks, another identical bill on this subject, H. R. 7006, has been introduced. These bills are before the Senate and House Judiciary Committees, respectively. The full text of S. 932 appears in the May 1957 issue of the *American Bar Association Journal.*

A new special committee has been created within the Association, under the chairmanship of Donald C. Beelar of Washington, D. C., to deal with the legislative bills just referred to. This new committee is known as the Committee on Office of Federal Administrative Practice Act.

The Special Committee has also completed a draft of a new Code of Federal Administrative Procedure to replace the Administrative Procedure Act. A committee of the Section of Administrative Law, headed by Dean E. Blythe Stason, assisted in the preparation of this draft. That proposed new Code is contained in this issue of the *Bulletin*. On May 11, the Board of Governors of the Association authorized the creation of a new special Committee on Code of Federal Administrative Procedure, which is to be charged with presenting this new code to the Congress.

The Special Committee has also completed a draft of bills to establish a new United States Labor Court and a new United States Trade Court. Both of these new courts would be established under Article III of the Constitution. A draft of a bill to remove the United States Tax Court from the executive to the judicial branch of the Government has also been completed by the Special Committee on Legal Services and Procedure. The Board of Governors of the Association, on May 11, 1957, also authorized the establishment of a new special Committee on Courts of Specialized Jurisdiction, which is to be charged with responsibility for presenting these court bills to the Congress.

Bills have also been completed to deal with the problems of legal services within the Defense Department. Such bills will be presented to the Congress by a new Committee on Defense Department Legal Services, also created by the Board of Governors on May 11.

The President of the Association is expected to announce the names of the members of these new committees shortly.

Under the action of the Board of Governors, the role of the Special Committee on Legal Services and Procedure will hereafter be that of an advisory nature. It is likely that all of the proposed legislation drafted by the Special Committee will be introduced in the Congress before it concludes its current session.

Considered in its aggregate, this is a broad and comprehensive legislative program, and the four new special committees charged with dealing with this legislation will undoubtedly call upon the Section of Administrative Law, as well as other committees and sections of the Association, to assist in connection with committee hearings, and other matters.

Compensation of Hearing Examiner and Judicial Officer, Department of Agriculture. As previously reported, the ABA Board of Governors approved this resolution (see 9 Ad. Law Bul. 18-19) at the October, 1956 meeting. The National Committee has drafted legislation which has been introduced as set out in that Committee's resume of legislation elsewhere in this issue of the *Bulletin*.

Judicial Review. The Council, at the Chicago mid-winter meeting in February 1957 adopted resolutions on the subject of Judicial Review relating to (1) abbreviation of records and review on original papers, (2) jurisdiction in the case of multiple appeals, (3) uniform rules for review in the several jurisdictions, (4) printing of the record, and (5) prehearing conferences

and separation of issues on review. The resolutions were approved by the ABA House of Delegates, after a most interesting discussion which is fully reported in the April 1957 ABA *Journal* (43 ABA *Journal* 334 *et seq.*). The Section's Committee on Judicial Review, with unwarranted modesty, has omitted these important materials from its report contained in this issue of the *Bulletin.*

Statutory Restrictions on Attorneys Fees. The Section's resolution, advocating the removal of restrictions and limitations on attorneys fees (9 Ad. Law Bul. 18) and passed at the Dallas meeting last August, was approved by the ABA's House of Delegates without significant change (see 43 ABA *Journal* 334, April, 1957) and further news on that subject is contained in this issue in the report of the Committee on Representation Before Agencies.

Agency Recognition of Attorney Representation. The resolution adopted by the Section at the August 1956 Dallas meeting was approved by the ABA Board of Governors in October 1956 (9 Ad. Law Bul. 19-20) and a further report on this matter is contained in this issue of the *Bulletin* in the report of the Representation Committee.

Voluntary Contributions. Your Section undertook extraordinary responsibility this year in preparing initial drafts of the proposed New Code of Federal Administrative Procedure. Although the Section received a special ABA appropriation for that work, it was not sufficient to meet all expenses in connection therewith. Consequently, a request for voluntary contributions was necessary and the response of the membership has been generous, with approximately $1,400 having been received. It is believed that it is the universal hope of all officers and Council members that voluntary contributions may become unnecessary.

Membership. It will be recalled that a membership list was run in the first issue of this volume of the *Bulletin.* It was hoped that changes in that list could be run from time to time. However, thus far, it has not been possible to work out with ABA headquarters a method of keeping our membership list current. A solution for this perennial problem should be a number one objective of the Section's Development Committee for next year.

Committee on ABA Participation in Appointment of Agency Members. This special committee, headed by Clarence Davis, had not completed its work at the mid-year meeting and is expected to report to the Council and the Section at the Annual Meeting.

Committee on Procedural Problems In the Field of Atomic Energy—Several members of the Section have suggested the desirability of a Section Committee having jurisdiction over procedural and practice matters in the atomic energy field, and particularly A.E.C. matters. The Council will consider at the July meeting the possibility of such a Committee. If any Section members are interested in such Committee, it would be appreciated if the Chairman could be advised as soon as possible.

HAROLD L. RUSSELL
Chairman

THE WORK OF THE OFFICE OF ADMINISTRATIVE PROCEDURE

by

J. Smith Henley, Director

No single fact is more striking in a review of existing federal administrative agencies than the variety of the duties which are entrusted to them to perform.

Historically it is known that federal administrative proceedings, particularly adversary administrative proceedings, began their development on a noteworthy scale with the creation, in 1887, of the Interstate Commerce Commission. Thereafter, as more and more complex problems were presented, the Congress turned increasingly to the administrative agency. So today, more than fifty administrative agencies of the federal Government collectively have the responsibility for determining for our people a very substantial segment of our rights, privileges, and obligations. It is estimated that the administrative business today may exceed in volume the civil business in all of our courts.

This increased regulation of the citizen, varying as it does in substance, has been accompanied by substantial dissimilarity in regulatory procedures which at times may have contributed to the charge that administrative justice is not marked by economy, simplicity, or dispatch.

But, during the past twenty years, administrative law has begun to show signs of maturity and development. Rules of practice, the Administrative Procedure Act, establishment of judicial precedents, all have tended to increase public confidence in the administrative process and to make of administrative law a more cohesive body.

Throughout this same twenty years and at present groups of responsible and public spirited citizens, including public officials, bar associations, and others have continued, and do continue, to work for improvement of the administrative process. A conclusion common to many of these groups has been that elimination of unnecessary delay, expense, and volume of records in administrative proceedings, and the improvement of procedures generally, can best be accomplished by the regulatory agencies themselves acting in concert with some central office.

Acting upon these conclusions and to implement the recommendation that such an office be created in the Department of Justice, the Attorney General in December 1956 announced the establishment of an Office of Administrative Procedure. In establishing the office, the Attorney General emphasized that duties of the office will include—

(1) study of the adequacy of existing procedures in the federal agencies for determining the rights, duties, and privileges of persons having business before the agencies;

(2) assistance to the agencies in the formulation of rules and improvement of administrative procedures;

(3) initiation of cooperation between agencies and their respective bars in developing and adopting as far as practicable uniform rules of practice and procedure.

In short, in General Brownell's words: "It is the purpose of the office we are establishing today to develop through cooperative efforts the support of the federal agencies and the bar for the greater improvement of administrative procedures."

Broadly speaking, the office will operate within the framework of certain of the recommendations of the President's Conference on Administrative Procedure. That conference, in which some 75 prominent public officials and members of the bar participated, recommended to the agencies, *inter alia,*—

(1) That every agency consider unnecessary delay, expense, and volume of records in adjudicatory and rule-making proceedings to be detrimental to the public interest;

(2) That every agency having adjudicatory or rule-making functions make a comprehensive and intensive study of its own procedures in order to discover and eliminate any unnecessary delay, expense, or volume of records which may presently occur in its proceedings; and

(3) That the agencies in collaboration with the bar and an Office of Administrative Procedure, if established, undertake a detailed study of the full area within which uniformity in rules is attainable inasmuch as the Conference finds that it is feasible and desirable to formulate uniform rules for many aspects of administrative procedure.

Since these recommendations of the Conference appear to have widespread support among the judiciary, the agencies, the bar, and the public, it is believed that efforts toward implementation of the recommendations will receive sympathetic consideration.

Thus, we are proceeding amain with plans to encourage initiation within the agencies of measures designed to effectuate the recommendations of the President's Conference to which reference has been made, to develop procedural uniformity where practicable, to act as a clearing house of procedural information, and within the limits of available staff to conduct such special research as the agencies may find helpful.

The office has been in existence about six months. Within that period working arrangements with virtually all of the administrative agencies have been established. As a result of these arrangements, specific procedural studies have been undertaken and specific procedural information has been made available in a variety of situations. Included is work in connection with new or completely revised codes of procedure, preparation of material with respect to a single rule, such as taking of depositions, and advice with respect to procedural aspects of pending or proposed legislation.

Members of the American Bar Association may be interested in knowing that we are in consultation with both agency representatives and bar groups concerning uniform practices with respect to admission and recognition of attorneys. These consultations have reached the stage of formulation of definite recommendations to the agencies and bar for consideration of rules, which, if adopted, would liberalize

and make substantially uniform throughout the Government procedures with respect to admission and recognition of lawyers in administrative proceedings.[1]

In the firm belief that analysis of hearing problems by statistical methods will go far in providing a basis from which administrators and the bar can devise improvements in procedure, we are devoting considerable effort to development of a system for reporting and publishing significant statistics concerning agency adjudicatory hearings.

As may be indicated by the foregoing brief description of the work of the office, our method is to deal with a few particular problems at a time acting as a nucleus for cooperative effort among agency and bar representatives.

In dealing with other agencies of the Government, the office functions in an advisory capacity. Primary responsibility for discharge of primary statutory obligations rests upon the agencies rather than upon the Office of Administrative Procedure. Likewise, primary responsibility for formulating the specialized procedures which are calculated to cope with specialized problems rests upon the agencies. Thus, in view of the paramount interest and responsibility which the agencies now have, it seems reasonable to expect that such improvement in administrative procedures as results from the activities of the office will be achieved largely because the agencies themselves are willing to do much of the required work.

No dramatic or spectacular reforms are expected. But it is believed that constant, patient, and open-minded pursuit of procedural ideals will over a period of time do much to improve administrative procedures.

Some few have noted that the office, as presently constituted, differs in some respects from the kind of body recommended by the Attorney General's committee (1941) and more recently by the Hoover Commission and the American Bar Association's Special Committee on Legal Services and Procedure. To the extent that advocates of different structure and authority for the office are disposed to press for changes which they may consider desirable, such efforts are not inappropriate. It certainly is not to be understood that the structure and authority are immutable.[2] However, differences of opinion concerning structure and authority of the office should by no means cause the holders of such opinions to withhold their full cooperation from the office, for the differences are merely in method of achieving the common aim—improvement in the administration of justice under law.

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[1] A committee from the Section on Administrative Law, A.B.A., has been consulted with respect to admission and recognition problems. Presumably, the committee will publish a report of its work. For discussion of some aspects of admission problems, see *Admission of Attorneys to Practice Before Federal Administrative Agencies—An Analysis and Recommendation*, published by the Department of Justice, May 1957 [which is published *infra*, p. 152.

[2] As the official release puts it, "Operation of the office will be on an experimental basis for an initial period while experience indicates the extent of its usefulness. * * * It is felt that it is necessary through temporary arrangements to develop experience, thus laying the groundwork for later legislation since the office, while similar in some of its aspects to the Administrative Office of the Courts, has no precedent in the executive branch of the Federal Government." Department of Justice Press Release, December 4, 1956.

It would be difficult to overemphasize the truth of the proposition that the Office of Administrative Procedure can contribute to procedural improvement only to the extent that its facilities are used by and useful to those who seek improvement.

The members of the Association and its committees are invited to bring to our attention procedural problems for which solution is being sought. Our staff is ready and willing to attempt to contribute to the success of your efforts. The Association in turn may be assured that the Office of Administrative Procedure expects to call for the full cooperation and assistance of the bar.

ADMISSION OF ATTORNEYS TO PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES

Mr. J. Smith Henley, Director of the Office of Administrative Procedure, Department of Justice, issued the following report on "Admission of Attorneys to Practice Before Federal Administrative Agencies—An Analysis and Recommendation" on May 31, 1957. In transmitting the report to Charles S. Rhyne, with copies to the representatives of the various bar association groups who had worked with him on this matter, Mr. Henley said:

> I believe our suggestions are in harmony with the thinking of substantial segments of the organized bar and thus merit support. Accordingly, we are hopeful that the American Bar Association, its affiliated organizations and individual members, will join in making known to the agencies and to us their views concerning admission procedures of the ten agencies which now require formal applications for permission to practice law.

An Analysis and Recommendation *

Only ten of the departments and other administrative agencies of the Federal Government require that attorneys-at-law desiring to represent others before the respective departments or agencies file applications for admission to practice.[1] Seven of the ten require no documentary or other support of an attorney's application. Two agencies require that the application be supported by the certificate of the clerk of the court before which the attorney is admitted to practice. Only the Patent Office—since 1934—requires the passing of an examination by attorneys desiring to practice before it in patent cases. And only the Treasury Department regularly investigates attorney applicants.

The other administrative agencies, some 30 of which conduct adversary administrative proceedings, have not found it necessary to adopt formal admission procedures. A question thus arises as to whether formal admission procedures best serve the public interest.

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* The Tax Court is not considered in this analysis. "The Tax Court is * * * for all practical purposes a judicial tribunal operating in the federal judicial system." *Stern v. Commissioner of Internal Revenue,* 215 F. 2d 701, 707-708 (C. C. A. 3, 1954).

[1] Appendix A. The text of rules for admission of attorneys to practice before these agencies is in Appendix E. [Appendix E has been omitted.]

The right to appear by a representative, and be heard, is a precious one usually respected by all branches of the Government. Representatives of individuals whose rights are to be affected by agency action should be reliable and competent. The Government and other participants should be able to rely upon the integrity of adversary representatives. And, so it is undoubtedly in the public interest to impose safeguards which will insure, consistent with freedom of choice of representatives, that representatives before agencies are qualified in character and competence to perform the responsibilities reposed in them.

In the case of non-lawyer representatives who may be subject to little or no standard of competence or character other than that which may be imposed by the agencies before which they practice, it may be incumbent upon the agencies to impose special requirements as to competence and character and special limitations relating to the scope of representative activity.

In general, however, it is within the province of the several states to regulate the practice of law, and the Federal Government probably should not invade this province unless state action threatens to substantially impede Federal functions.

Every lawyer must be admitted to the bar of some state, territory, possession, or of the District of Columbia.[2] He is admitted upon a showing that he is of good moral character, that he has formal educational requisites, and after rigorous examination as to his knowledge of the law. He subscribes to an oath of admission and a code of ethics. He is subject to investigation prior to admission, and to continuous surveillance by bench, bar, and public after admission.

All these admission requirements are usually administered by and under supervision of one or more courts and they may be said to afford a reasonable degree of protection to the public when applied to administrative practice. Many agencies which have no formal admission procedures rely upon the state admission procedures entirely through rules which permit any person admitted to practice by a state to practice before the agency.[3] Indeed, even those agencies which prescribe formal admissions do similarly rely, for not only is admission based purely upon a showing of bar membership in good standing[4] but discipline likewise is in practice left primarily to the courts and to the organized bar.[5]

The mere filing of a formal statement that the applicant is a lawyer in good standing would appear to give little protection to either the Government or to the public. Since he cannot hope to successfully misstate the obvious, the prospective practitioner who is clearly ineligible will be excluded by a threshold filing requirement. But the presence or absence of a piece of paper has little effect upon the

2 Courts in the District of Columbia, the territories and possessions are United States Courts, and they may initially admit persons to practice as attorneys.

3 Among those are the agencies listed in Appendix B which do not require formal application.

4 Except in the Treasury Department and the Patent Office.

5 Although many agencies do, and should, provide by rule for suspension, censure, or disbarment, rare indeed is the administrative disciplinary proceeding. See vom Baur—*Survey of the Legal Profession*, c. IV B (1953).

basic problems of qualification or effective discipline of lawyers.

Regardless of the presence of a formal application the Government, as it is entitled to do, relies most heavily upon the legal profession and the courts to insure that those who are admitted to practice law are qualified. And disciplinary sanctions, when necessary, may be invoked just as effectively against lawyers who are practicing before an agency without benefit of formal admission as when the applicant has gone through the formality of saying to the agency: "I am a lawyer." And, having the agency reply, "Yes, you appear to be a lawyer. Your name will be entered upon the register."

Indeed, some twenty agencies [6] have made provision for disbarring, enjoining, suspending or otherwise disciplining attorneys who practice before them. Yet only a few base jurisdiction to do so upon any formal admission requirement. Virtually all agencies have rules governing the conduct of attorneys appearing before them. Violation of these rules may, and should, be made grounds for disbarment, censure, or suspension. But jurisdiction over a practicing attorney can be predicated upon the act of practicing, as well as upon the filing of a certificate, statement or affidavit.

The expense of formally admitting and registering lawyers is not inconsiderable. The Hoover Commission states that "at least $300,000 a year could be saved by the Treasury Department" alone by eliminating certain of its admission procedures for attorneys.[7] The Patent Office estimates that approximately $10,000 is spent annually to qualify and enroll attorneys and agents for patent practice.[8] Other agencies which neither investigate nor examine attorneys undoubtedly spend some money. As a minimum, there will be an exchange of correspondence between agency and applicant and at least some staff time will be consumed in perusing the application and entering the attorney's name in a file or register.

Moreover, the burden of expense does not fall entirely upon the ten agencies which require formal application. Many attorneys who do not specialize in agency practice to an extent which justifies maintenance of a set of C.F.R. will, from time to time, have some business with the Government. It is believed that, in general, such attorneys do not know which agencies have admission requirements and which do not.[9] Thus, an attorney may correspond with a number of agencies before which he desires to practice only to find, at expense to himself and the Government, that no application for admission is required.

For several years the admission rules have been subjected to sporadic attack. As long ago as 1941, the Attorney General's Committee on Administrative Procedure was critical of the "unjustifiable

[6] Appendix B.

[7] Hoover Commission Report on Legal Services and Procedure (1955), p. 40.

[8] Task Force Report on Legal Services and Procedure (1955), p. 306.

[9] At a meeting of the D. C. Bar Association, held on January 8, 1957, inquiry was made as to whether the Office of Administrative Procedure intended to do anything to eliminate present requirements that lawyers be admitted separately by "75" different agencies.

annoyance'' to members of the bar in connection with their admission to practice before Federal administrative agencies.

In 1952, in a study sponsored by the ''Survey of the Legal Profession,'' F. Trowbridge vom Baur declared, in part,—

> ''No purpose appears to be served by requiring lawyers to apply for admission to practice before a variety of different agencies. If a lawyer is qualified to practice law in any State, he would appear, *ipso facto,* to be qualified to practice before any agency except the Patent Office. Moreover, all the agencies except the Patent Office admit lawyers to practice upon substantially the same proof, that is, proof that he is a member in good standing of a State or Federal Bar. The result is that a lawyer must now go repeatedly through the same motions in order to become admitted to practice before a number of different agencies. In addition to being annoying, troublesome and expensive for lawyers, it results in expenditure by the agencies of thousands of dollars every year * * *.'' [10]

Both the Hoover Commission [11] and its Task Force on Legal Services and Procedure [12] similarly condemned formal admission procedures.[13]

The statement [14] of the President of the American Bar Association, David F. Maxwell, before the Bar Association of the District of Columbia on April 10, 1957, is but the latest highly placed attack on present procedures. President Maxwell said: ''Lawyers who have practiced before State Supreme Courts should be able to argue cases before Federal Government agencies without further check on their qualifications.''

Congressional interest in admissions is also in evidence. Now pending in the Congress is one bill (H. R. 261, 85th Cong., 1st sess.) which provides that attorneys in good standing may appear before administrative agencies without written application or without complying with other formalities. Companion proposals (S. 932 and H. R. 3350) would, *inter alia,* replace agency control over admission and discipline of lawyers with a central organization having expanded powers.

Other available information also may tend to confirm the charge that present restrictions on admission of lawyers in good standing may be unjustified as efficient, effective or economical controls.

The General Accounting Office, for example, has admitted 300 attorneys to practice before it in the past six years without denying a single application. Many agencies either have rules that permit ''on the spot'' admission of attorneys in matters pending before them—thus, in part, frustrating the purposes of the admission requirements—or, as has been said with re-

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[10] Quoted from *Standards of Admission for Practice Before Federal Administrative Agencies,* Sponsored by the Survey of the Legal Profession, Under the Auspices of The American Bar Association, 1953, p. 22.

[11] Hoover Commission Report on Legal Services and Procedure (1955), p. 37.

[12] Hoover Commission Report of the Task Force on Legal Services and Procedure (1955), pp. 305, 306.

[13] While the Hoover Commission and its Task Force were of the view that legislation is necessary to correct and make uniform the admission situation, it would appear to be possible for the agencies to adopt rules which would achieve substantial uniformity in this field.

[14] "The (Washington) Evening Star", April 10, 1957, p. A-28.

spect to one agency, "honor more in the breach than the observance" the rules relative to admitting attorneys.

The Treasury Department makes some investigation of the applicant (including the applicant's own income tax filing history for the three years immediately preceding date of the application), but a temporary authorization to practice is issued immediately following receipt of the attorney's application. In 1956, the Treasury Department processed about 6,000 applications to practice—these include both attorneys and non-attorneys. Of these an average of 12 each month were withdrawn and 3 were denied. Thus, assuming the monthly total of 15 were withdrawn or denied because of derogatory information developed or anticipated, the admission procedures directly excluded 180 applicants for the year.[15] The Hoover Task Force found that the Treasury Department spends $585,000 annually in investigating and admitting would-be practitioners, both lawyers and non-lawyers, and concluded that investigation of lawyers could be discontinued at substantial saving.[16]

The Patent Office, in 1934, began requiring attorneys and non-attorneys to pass an examination prior to admission to practice before it in patent cases, unless they have had three years' experience in the examining corps of the Patent Office. Of 138 lawyers who took the November 1956 examination, 94 passed.[17] As may also be true with respect to the Treasury Department, the question is not only whether the restrictions on practice by lawyers before the Patent Office furnish adequate protection, but also whether the restrictions may not protect too much.

Published typical questions indicate that the examination is concerned with Patent Office procedure and patent law. The ablest of lawyers would hesitate to take bar examinations long after they have completed their formal law studies. There is little to suggest that patent law and procedure are more intricate than trademark law, also administered by the Patent Office, or many other laws administered by Federal regulatory agencies. Moreover, neither attorneys nor judges in the courts which try patent cases or patent appeals are required to submit to special examination of their knowledge of patent law or procedure. Any competent lawyer should be able either to prepare himself or to recognize the need for associate counsel in patent cases as in trade-mark and other cases before administrative agencies.

The overwhelming majority of Federal administrative agencies which do not require the filing of applications by attorneys is increasing. In recent years, the Federal Trade Commission and the Foreign Claims Settlement Commission have discontinued their former rules of requir-

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15 Treasury figures taken from letter of February 21, 1957, Director of Practice, to Director, Office of Administrative Procedure. For the 4-year period, 1953-1956, an average of 69 were denied and 192 were withdrawn each year. See also Appendix C.

16 Report of the Task Force on Legal Services and Procedure (1955), p. 306.

17 Of 168 non-lawyers who took the same examination, 93 passed. Figures supplied on March 14, 1957, by letter from Commissioner of Patents to Director, Office of Administrative Procedure. See also Appendix D for data on admissions 1952-1956.

ing the admission of attorneys to practice before them. These agencies have encountered no difficulties from changing their rules, but they have enjoyed savings of time and money through the elimination of the admission requirements for attorneys.[18]

In the interest of uniformity and economy, and as a matter of good public relations, it is suggested that the eight agencies of the Federal Government which now admit upon a showing of bar membership in good standing should consider whether the public interest would not be served by abolition of formal admission procedures for attorneys-at-law.

Submitted also for consideration by these agencies, the bar, and other interested members of the public is a proposed rule which, if adopted, would greatly simplify and tend to make uniform admission standards without in any way diminishing agency disciplinary authority. The proposed rule reads:

> *Practice by Attorneys.* Any person who is a member in good standing of the bar of the Supreme Court of the United States or of the highest court of any state, territory, or of the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law, may represent others before the agency.
>
> *Signature To Constitute Certificate.* When a person acting in a representative capacity appears in person or signs a paper in practice before this agency, his personal appearance or signature shall constitute a representation to the agency that under the provisions of these regulations and the law he is authorized and qualified to represent the particular party in whose behalf he acts. Further proof of a person's authority to act in a representative capacity may be required.

With respect to practice before the Treasury Department and the Patent Office, it is suggested, in addition, that consideration should be given to the question whether their respective restrictions on admission of attorneys-at-law are not more stringent than necessary either to protect the public or the Government. Perhaps, these agencies also may appropriately serve the public interest by adopting the proposed uniform rule hereinabove suggested.

[18] Letter from Foreign Claims Settlement Commission to Director, Office of Administrative Procedure, dated March 7, 1957.

APPENDIX A

Requirements for Admission of Attorneys to Practice before Administrative Agencies

Agency	*Application Required*	*Certificate of Court*	*Examination Required*
Board of Immigration Appeals and Immigration & Naturalization Service	X	X	
Federal Communications Commission	X		
General Accounting Office	X		
Interstate Commerce Commission	X	X	
Patent Office	X		X[1]
Post Office	X		
Subversive Activities Control Board	X		
Treasury Department	X		
United States Civil Service Commission	X		
Veterans Administration	X		

[1] In patent cases only.

APPENDIX B

Admission and Disbarment of Attorneys before Federal Administrative Agencies

Agency	*Application Required— Register Kept*	*Provisions for Disbarment*
Department of Agriculture		X
Department of Commerce		
Bureau of Foreign Commerce		X
Civil Aeronautics Administration		X
Civil Aeronautics Board		X
Patent Office—		
Patent Cases	X	X
TM Cases		X
Department of the Interior		X
Sec'y re Public Lands		X
Department of Justice		
Immigration & Naturalization Service	X	X
Board of Immigration Appeals	X	X
Department of Labor		
Deputy Commissioner		X

Agency	*Application Required— Register Kept*	*Provisions for Disbarment*
Federal Security Agency		
Employees Comp. App. Bd.		X
Federal Coal Mine Safety Board of Review		X
Federal Communications Commission	X	X
Federal Deposit Insurance Corporation		X
Federal Maritime Board		X
Federal Power Commission		X
Federal Reserve Board		X
Foreign Claims Settlement Comm. of U. S.		X
General Accounting Office	X	X
Indian Claims Commission		X
Interstate Commerce Commission	X	X
National Labor Relations Board		X
Post Office Department	X	X
Postmaster General	X	X
Securities and Exchange Commission		X
Soc. Sec. Adm., Appeals Council		X
Subversive Activities Control Board	X	X
Treasury Department	X	X
United States Civil Service Commission	X	X
United States Tariff Commission		X
Veterans Administration	X	X

APPENDIX C

Disposition of Applications for Admission to Practice before Treasury Department (Monthly Average)

Applications received 500

	Denied	*Withdrawn*
1956	3	12
1955	4	13
1954	7	28
1953	9	21
Average for period	5.75	16

Source: Letter of Director of Practice, Treasury Department to Director, Office of Administrative Procedure, February 21, 1957.

APPENDIX D

Table I. Applications (by Attorneys and Non-Attorneys) for Admission to Practice before Patent Office in Patent Cases

Date of Examination	*Applicants*	*Did Not Take Examination*	*Passed*	*Failed*
1956—February	442	44	158	240
1956.....	424	54	195	175
1955.....	416	65	178	173
1954.....	445	68	208	169
1953—October	405	49	177	179
February ...	442	44	158	240
1952.....	376	67	107	202

Source: Letter of Commissioner of Patents to Director, Office of Administrative Procedure, March 14, 1957.

Table II. Attorneys Admitted to Practice before Patent Office in Patent Cases

Year	*Passed Examination*	*Examination Waived* *
1956.....	102	26
1955.....	235	29
1954.....	117	33
1953.....	118	39
1952.....	154	51

* Three years' experience in examining corps.

Source: Letter of Commissioner of Patents to Director, Office of Administrative Procedure, March 14, 1957.

RECENT LEGISLATIVE ACTIVITY IN FIELD OF ADMINISTRATIVE LAW AND RELATED FIELDS OF INTEREST TO SECTION MEMBERS

Submitted by the National Committee

85th Congress, 1st Session

I. Administrative Procedure

1. HR 113

(Jan. 3—Celler—Ref. to Judiciary Committee)

This bill would amend Section 11 of the APA by establishing a Board of Examiner Administration in the Civil Service Commission and would provide for the compensation of Examiners at a GS-18 salary.

2. HR 831

(Jan. 3—Multer—Ref. to Judiciary Committee)

This bill would amend Section 5 of the APA by providing that no determination by a governmental agency "involving the exercise of judgment or discretion shall be made except after a public hearing on notice to the party or parties involved indicating precisely the objections, if any, to granting or approving the application".

The bill would also amend Section 10(e) of the APA by providing that "proof before the reviewing court on the part of the official, agency, department, bureau, or commission of the United States, shall be limited to the facts set forth in the findings of fact contained within its decision or determination under review".

The bill would also amend, in certain respects, Sections 8 and 10(d) of the APA. The proposed 10(d) amendment relates to the power of reviewing courts to stay agency action.

3. HR 832

(Jan. 3—Multer—Ref. to Judiciary Committee)

This bill relates to the authority of reviewing courts, under Section 10(d) of the APA, to stay administrative action upon a showing of irreparable injury.

4. HR 119

(Jan. 23—Smith—Ref. to Rules Committee)

This resolution provides for the creation of a Standing Committee of the House of Representatives on Administrative Procedure and Practice.

This legislation originated in the Section and is ABA approved.

5. HR 3948

(Jan. 29—Chudoff—Ref. to Judiciary Committee)

The bill would amend Section 4 of the APA by providing specifically that matters relating to "lands and natural resources * * * owned by the United States" shall be covered within the rule-making provisions of that section.

6. HR 4921

(Feb. 18—Hyde—Ref. to Judiciary Committee)

S 1550

(March 12—Kefauver—Ref. to Post Office and Civil Service Committee)

This bill would amend Section 11 of the APA by providing for the compensation of Examiners at the effective rate of GS-18 and would also provide for the adjustment of the basic compensation of the Judicial Officer of the Department of Agriculture.

This legislation originated in the Section and is ABA approved.

7. HR 3424

(Jan. 22—Younger—Ref. to Government Operations Committee)

This bill creates a Department of Transportation and Communication with a cabinet officer as its head and combines the functions and personnel of ICC, FCC, CAB, CAA, National Advisory Committee for Aeronautics, Federal Maritime Board, Maritime Administration, St. Lawrence Seaway Development Corporation, and certain transportation and highway functions of the Secretary of Commerce.

8. HR 1196

(Jan. 3—McDonough—Ref. to Interstate & Insular Affairs Committee)

S 1749

(March 28—Magnuson—Ref. to Interstate & Foreign Commerce Committee)

This bill establishes a Commission for Payments to State and Local Governments on Federal Real Property with the "general objective of

avoiding inequities between the taxpayers of particular States and local governments on the one hand and the taxpayers of the Federal Government on the other hand in the distribution of tax burdens and governmental costs associated with the ownership or use of property by the Federal Government."

According to Section 507 of the bill, "All functions performed under this Act shall be exempt from the operation" of APA, except with regard to the requirements of Section 3 of APA.

9. HR 6829

(April 11—Fino—Ref. to Post Office & Civil Service Committee)

This bill provides for the right to a hearing before removal or suspension, as well as for the right to a judicial review of such removal or suspension of classified (competitive) civil service employment.

10. S 1890

(April 16—Watkins—Ref. to Judiciary Committee)

This bill establishes a Commission and Advisory Commission on International Rules of Judicial Procedure and is sponsored by the Department of Justice.

11. HR 6788

(April 10—Celler—Ref. to Judiciary Committee)

This bill would authorize the abbreviation of the record on the review or enforcement of orders of administrative agencies by the courts of appeals and the review or enforcement of such orders on the original papers with federal courts of appeals empowered to make uniform the law relating to the record on review or enforcement of such orders.

This legislation was anticipated by the Section and the principles have received ABA approval.

12. HR 6789

(April 10—Celler—Ref. to Judiciary Committee)

This bill provides for reasonable notice of applications to the United States courts of appeals for interlocutory relief against the orders of certain administrative agencies, including the CAB.

House Subcommittee No. 3, in executive session, ordered a favorable report. June 5, 1957 H Rept. 533.

13. HR 6568

(April 2—Hyde—Ref. to Interior & Insular Affairs Committee)

This bill would establish a procedure for determining the extent to which a state or local government should be paid by the Federal government for certain of its tax exempt real or tangible personal property situated within the jurisdiction of the particular state or local government. However, Section 507 of the bill would exempt this procedure from the APA.

II. Agriculture

1. HR 1077

(Jan. 3—Bow—Ref. to Agriculture Committee)

HR 2186

(Jan. 7—St. George—Ref. to Agriculture Committee)

These bills relate to dairy stabilization and would create, in the Department of Agriculture, a Federal Dairy Stabilization Board of fifteen members.

2. HR 187

(Jan. 3—Gross—Ref. to Agriculture Committee)

This bill would enact the "Agricultural Equality Act of 1957" and assure processors of farm products of minimum prices not less than the cost of production.

3. HR 209

(Jan. 3—Burdick—Ref. to Agriculture Committee)

This bill relates to the regulation of registration, manufacture, labeling and inspection of fertilizer, etc.

4. S 313

(Jan. 27—Aiken—Ref. to Agriculture & Forestry Committee)

HR 377

(Jan. 3—Polk—Ref. to Agriculture Committee)

This bill outlines a scheme for compulsory inspection by the Department of Agriculture of poultry products. Among other related bills are HR 514, HR 767, HR 1964, HR 3052, and HR 4357. Subcommittee 4 of the Senate Committee on Agriculture & Forestry held hearings on Feb. 27, 28 on S 313 and similar bills, S 645 and S 1128. An informal, non-public hearing was held on HR 377 on Feb. 26, 1957.

5. HR 4145

(Jan. 30—Thompson—Ref. to Agriculture Committee)

HR 3476

(Jan. 23—Abernathy—Ref. to Agriculture Committee)

These are related bills dealing with the regulation, control and eradication of plant pests.

HR 3476 was reported with amendments on April 1 (H Rept 289, 309) and passed by the House the same day. S 1442, a related bill, was passed by the Senate on March 27.

6. S 43

(Jan. 7—Aiken—Ref. to Agriculture & Forestry Committee)

This bill would set up a food stamp allotment plan. The Committee has requested comments on the bill from the Departments of Labor and Health, Education and Welfare, with a neutral report being submitted by the Department of Labor.

7. S 774

(Jan. 23—Carlson—Ref. to Agriculture & Forestry Committee)

This bill would modify the Agricultural Adjustment Act of 1938, as amended and provide for marketing certificates for wheat, etc. The Committee has requested a report from the Department of Agriculture.

8. S 1747

(March 28—Ellender—Ref. to Agriculture & Forestry Committee)

This bill, entitled the Poultry Products Inspection Act, provides for compulsory inspection of poultry and poultry products for wholesomeness, the maintenance of sanitary facilities and practices, as well as correct, informative labeling by the Department of Agriculture.

S Rept 195 reveals that the Subcommittee on Agricultural Research and General Legislation held hearings on the same general problem during the 84th Congress, 2d Session [Cf., S 3588, S 3983, 84th Cong.], but reported its original bill, S 4243, too late in the session for Senate action. The full Committee held hearings during the current session on the same problem in relation to S 313, S 645, and S 1128.

As a result of the testimony elicited at the hearings, the principal sponsors of the latter bills, worked with the Committee and the Committee-sponsored bill, S 1747, resulted. S Rept 195 contains Committee explanation of this legislation.

S 1747 was passed by the Senate on April 8, 1957 (Cong. Rec. p. 4667-81).

9. HR 6750

(April 9—Johnson—Ref. to Interstate & Foreign Commerce Committee)

HR 6795

(April 10—Marshall—Ref. to Interstate & Foreign Commerce Committee)

These bills, entitled the National Milk Sanitation Act of 1957, would establish standards of identity, sanitation standards, and sanitation practices for the production, processing, transportation, sale, and offering for sale of milk and milk products shipped in interstate commerce (or which affect interstate commerce) for consumption as milk and milk products in any State, county, or municipality of the United States. Authority for promulgation of regulations under the Act would be vested in the U. S. Surgeon General.

These bills also provide that: "In a case of actual controversy as to the validity of any order or regulation issued pursuant to section 13 hereof, any person who will be adversely affected by such order or regulation, if placed in effect may at any time prior to the thirtieth day after such order or regulation is issued file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order."

[See also, "Present Conditions in Agriculture," testimony of witnesses during hearings before the Agriculture Subcommittee of Appropriations Committee on Feb. 26, 1957. Govt. Printing Ofc. #89747, 166 pp.]

III. Claims

1. S 600

(Jan. 14—Johnston—Ref. to Judiciary Committee)

This bill would give the Foreign Claims Settlement Commission additional jurisdiction to determine, and make awards concerning, World War II damage claims of United States nationals.

The bill also contains proposed amendments to portions of the Trading with The Enemy Act.

Hearings held Apr. 4-6. See also, related bills HR 6034, HR 6102, HR 6888.

2. HR 2155

(Jan. 7—Huddleston—Ref. to Interstate & Foreign Commerce Committee)

This bill amends Section 17 of the War Claims Act of 1948 to enlarge the classes of persons entitled to receive payment of certain War claims. The date for the filing of such claim applications would be extended for one year beyond the date of enactment.

3. HR 5647

(March 6—Burdick—Ref. to Interstate & Foreign Commerce Committee)

S 1302

(Feb. 20—Young—Ref. to Judiciary Committee)

These bills would amend comprehensively the Trading with The Enemy Act.

Hearings held Apr. 4-6. See also, related bills HR 4416, HR 6083.

4. HR 5044

(Feb. 10—Anfuso—Ref. to Foreign Affairs Committee)

This bill would add the following subsection to section 303 of the International Claims Settlement Act of 1949: "Where the loss on account of which claims is filed under paragraph (1) or (2) of subsection (a) of this section was suffered by a natural person, such claim, if filed by a natural person who was a national of the United States on August 9, 1955, shall not be denied (1) on the sole ground that the person who originally suffered the loss was not a national of the United States on the date the loss was suffered or on the date of the armistice with the country with respect to which the loss is asserted, or (2) on the sole ground that the right to assert such claim was not vested in a national of the United States continuously from either the date the loss was suffered or the date of such armistice to the date the claim was filed with the Commission."

The bill would also amend subsection (b) of Section 311 by inserting at the end of that section the following: "or by natural persons, or the predecessors in interest of natural persons, who on August 9, 1955, were nationals of the United States".

S 625 is a related bill.

5. HR 5752

(March 7—Patterson—Ref. to Foreign Affairs Committee)

This bill would amend Section 304 of the International Claims Settlement Act of 1949 by making certain persons, who were citizens of the United States on the date of the enactment of the bill, eligible to file claims thereunder. S 979 is a related bill.

6. HR 6264

(March 21—Ray—Ref. to Interstate & Foreign Commerce Committee)

This bill amends the War Claims Act of 1948 by permitting recoveries by "civilian Americans," although only "civilian American citizens" are included.

IV. Communications

1. S 376

(Jan. 9—Bricker—Ref. to Interstate & Foreign Commerce Committee)

This bill amends the Communications Act of 1934 by authorizing the Federal Communications Commission to establish rules and regulations and make orders relating to networks and "such of their activities as affect licensed broadcast stations to operate in the public interest".

2. H Res 26

(Jan. 3—Dollinger—Ref. to Rules Committee)

This resolution would authorize and direct the Committee on Interstate and Foreign Commerce to investigate false, fraudulent, misleading and deceptive advertising by radio or television, Federal Communications Commission practice relating to such advertising, and related problems.

3. HR 4816

(Feb. 14—O'Hara—Ref. to Interstate & Foreign Commerce Committee)

S 1577

(March 14—Potter—Ref. to Interstate & Foreign Commerce Committee)

This bill repeals Section 309(c) of the Communications Act of 1934, relating to protests in license cases where "instruments of authorization" are issued or renewed without hearing.

4. HR 3514

(Jan. 23—Withrow—Ref. to Interstate & Foreign Commerce Committee)

HR 6430

(March 27—Tewes—Ref. to Interstate & Foreign Commerce Committee)

S 1759

(March 29—Magnuson—Ref. to Interstate & Foreign Commerce Committee)

These bills amend Section 307(d) of the Communications Act of 1934 by authorizing the Commission to issue and renew radio station licenses for five year periods, instead of the present three year periods. See, Cong. Rec. p. 4236, for FCC letter on subject.

5. HR 6748

(April 9—Harris—Ref. to Interstate & Foreign Commerce Committee)

This bill would amend Sections 503 and 504 of the Communications Act of 1934 to provide civil penalties for certain violations by radio licensees other than those in broadcast service.

V. Federal Employment and Govt. Contracts

1. HR 2479

(Jan. 10—Multer—Ref. to Post Office and Civil Service Committee)

This bill would establish a Federal Employees Security Review Commission of five members to review all cases in which the employment of a Federal worker has been suspended or terminated under any loyalty or security program. Judicial review of a Commission order would be obtainable in the Court of Appeals for the District of Columbia.

2. S 1326

(Feb. 2—Johnston—Ref. to Post Office & Civil Service Committee)

This bill would establish a system for the classification and compensation of scientific and professional Federal Government positions and provide for personnel salaries ranging from $5070 to $19,000 per

year. HR 6909 (introduced Apr. 15 by Geller) and HR 7041 (introduced Apr. 18 by Pelly) are related bills.

3. H. Con. Res. 43

(Jan. 5—St. George—Ref. to Post Office & Civil Service Committee)

This resolution would establish a Code of Ethics for Government officials and employees.

4. S Rept 167

(March 21—Report of Government Operations Committee)

This report is entitled "Organization of Federal Executive Departments and Agencies" and contains sixty-eight pages of factual information on the organization and present status of the various Federal agencies.

5. HR 3526

(Jan. 23—Morrison—Ref. to Post Office & Civil Service Committee)

This bill provides for "a more equitable system for the settlement of disputes arising from personnel actions in the classified civil service, and of grievances and complaints of all Government personnel" by means of a right of appeal to a board established under Section 3(a) of the Civil Service Appeal and Grievance Procedures Act of 1954.

6. HR 3640

(Jan. 24—Metcalf—Ref. to Education & Labor Committee)

This bill amends the Federal Employees' Compensation Act by providing for judicial review of decisions of the Employees' Compensation Appeals Board in the Federal District Court of the appellant's residence, principal place of business, the situs of the injury, or the District of Columbia. "The court shall have conclusive jurisdiction to hear, make findings with respect to any question of fact and reach conclusions with respect to any question of law, determine and render judgment of such claim." Such claims actions shall not be subject to any monetary limitation prescribed by 28 USC 1346 or other statute.

7. S 1653

(March 21—Smith—Ref. to Labor & Public Welfare Committee)

HR 6308

(March 25—Griffin—Ref. to Education & Labor Committee)

This bill amends the Federal Employees' Compensation Act. Section 34 of that Act is changed to provide for judicial review of decisions of the Employees' Compensation Appeals Board in the Court of Appeals for the Circuit of the employee's residence or employment or in the District of Columbia. The outcome of the petition for review shall be decided conclusively on the administrative record "with respect to questions of fact, if supported by substantial evidence on the record considered as a whole."

8. HR 3810

(Jan. 28—Bray—Ref. to Judiciary Committee)

This bill, entitled the Federal Construction Contract Procedures Act, seeks to establish policy and procedure in connection with construction contracts made by executive agencies. Exempted from these prescribed procedures are contracts involving less than $100,000, contracts to be performed outside continental United States, or some contracts involving military or public needs which must be accomplished without delay.

9. S Rept 1

(Jan. 9—Report of Government Operations Committee)

"Activities of the Senate Committee on Government Operations," issued by the Subcommittee on Reorganization for the Reorganization for the 84th Congress. [Govt. Printing Ofc. #86397, 102 pp.]

VI. Immigration and Nationality

1. S 1006

(Feb. 2—Watkins—Ref. to Judiciary Committee)

HR 4202

(Jan. 31—Billings—Ref. to Judiciary Committee)

HR 4205

(Jan. 31—Keating—Ref. to Judiciary Committee)

These bills contain the Attorney General's immigration proposals. Section 34 supplements Immigration & Nationality Act by giving the

Federal District Courts jurisdiction to review deportation orders solely by a petition to review, except that habeas corpus is made appropriate for aliens in custody (unless the alien is involved in criminal proceedings under Section 242(d), (e) or the issue has been previously determined in a valid and adequate judicial proceeding). Deportation proceedings are specifically exempted from the APA.

Venue is established in the district where the deportation hearing occurred, with deportation automatically being stayed pending judicial determination of the cause, which would be expedited in the same way as habeas corpus actions.

The bill also provides that a nationality claimant, whose claim is "not frivolous" shall be "entitled to have the issue of his nationality determined *de novo*" in an appropriate Federal District Court.

2. S 345

(Jan. 7—Watkins—Ref. to Judiciary Committee)

HR 507

(Jan. 3—Keating—Ref. to Judiciary Committee)

HR 1258

(Jan. 3—Scott—Ref. to Judiciary Committee)

These bills are identical with Section 34 of S 1006, HR 4202, and HR 4205. Cf., S 3169, 84th Congress.

3. HR 93

(Jan. 3—Boland—Ref. to Judiciary Committee)

HR 120

(Jan. 3—Cretella—Ref. to Judiciary Committee)

Sections 207 and 208 supplement the Immigration and Nationality Act by providing for judicial review of final exclusion or deportation orders, as well as citizenship claims, under either Section 10 of the APA or the Federal Declaratory Judgments Act.

Section 210 creates a Board of Visa Appeals in the State Department to review (1) demands, withdrawals, revocations of visas or visa extensions and (2) rulings relating to State Department rules and regulations on immigration. Review of this Board's decisions by the Secretary of State may occur in certain instances, with the Board's decision being subject to reversal or modification by the Secretary.

4. S 344

(Jan. 7—Watkins—Ref. to Judiciary Committee)

HR 506

(Jan. 3—Keating—Ref. to Judiciary Committee)

HR 1248

(Jan. 3—Scott—Ref. to Judiciary Committee)

Section 5 amends Section 236(a) of the Immigration & Nationality Act to provide that the Attorney General may assign an additional immigration officer to present evidence on behalf of the United States. The bill would leave untouched the authority conferred on the special inquiry officer conducting such proceeding.

Section 8 adds the following as an initial sentence to Section 242(b) of the Immigration and Nationality Act: "Proceedings to determine the deportability of any alien shall be commenced by the issuance of any process, pleading, or document as the Attorney General shall by regulations prescribe."

Cf., S 3168, 84th Congress.

5. HR 3364

(Jan. 22—Celler—Ref. to Judiciary Committee)

Section 107 creates a statutory Board of Immigration Appeals of nine lawyer members. The salary scale for the Board is set at $17,500 (Chairman) and $17,000. The Board's jurisdiction would embrace appeals from visa actions, interpretations of rules and regulations or any other determination made after hearing. The Board may hear evidence, take depositions, and issue subpoenas, with Board hearings generally being public, but occurring upon notice. The Board's hearing examiners would be appointed under Section 11 of the APA.

Section 110 provides for judicial review of all final Board orders, except for visa or reentry permit rulings, by appeal to the Federal Court of Appeals where the petitioner resides, is detained, or in the District of Columbia. The bill would leave untouched the availability of declaratory judgment relief, with citizenship claimants being able to elect to proceed either under Title 28 of USC or under Section 455 of the Act.

To like effect and purpose, see: HR 3599, HR 3648, HR 3656, HR 3739-3745 incl., HR 3936-3939 incl., HR 4086-4088 incl., HR 4178-4180 incl., HR 4274, HR 4375, HR 4409, HR 4437, HR 4588, HR 4908, HR 5015, HR 5475 not printed for distribution. Cf., HR 3364.

6. H J Res 26

(Jan. 3—Coudert—Ref. to Judiciary Committee)

This resolution establishes a Commission on Immigration and Naturalization Policy of twelve members, to be appointed by the President of the United States, the President of the Senate, and the Speaker of the House of Representatives.

The duties of the Commission are to "study and investigate—(1) the administration of the existing immigration and naturalization laws and their effect on the national security, the foreign policy, the economy, and the social welfare of the United States; and (2) such conditions within or without the United States which, in the opinion of the Commission, might have any bearing on the immigration and naturalization policy of the United States".

7. HR 907

(Jan. 3—Reuss—Ref. to Judiciary Committee)

This bill amends Section 20 of the Refugee Relief Act of 1953 by extending the authorized period for the issuance of visas under this Act. HR 3866 is a related bill.

8. HR 5612

(March 5—Walter—Ref. to Judiciary Committee)

This bill amends the APA by setting up a Passport Review Procedure in the State Department to review refusals to issue, renew or extend passports. Such proceedings would be conducted to protect from disclosure all information affecting the national security, safety and public interest, as well as investigative sources and methods.

The bill also amends the Communist Control Act of 1954, making it unlawful for any Federal Officer or employee to issue or direct the issuance, renewal or extension of a passport of any person known to be or believed to be under Communist discipline, to be a substantial supporter of the Communist movement, or to be proposing to travel abroad to engage in activities contributing to the strengthening of the Communist movement.

9 S 836

(Jan. 25—Ives—Ref. to Judiciary Committee)

This bill amends the Immigration and Nationality Act by providing for judiciary review in exclusion or deportation cases, as well as

for United States citizenship claimants, under Section 10 of APA or under the Federal Declaratory Judgments Act.

The bill also establishes a Board of Visa Appeals in the State Department to review consular determinations (1) denying, withdrawing or revoking a visa or visa extension and (2) concerning the scope of State Department rules or regulations on immigration. A further review of a limited number of cases by the Secretary of State is also contemplated.

10. S 1554

(March 12—Javits—Ref. to Judiciary Committee)

HR 6536

(April 1—Farbstein—Ref. to Judiciary Committee)

These bills amend the Immigration and Nationality Act to provide for procedures to authorize both temporary admission and adjustment of status to that of permanent residence for escapees from Communist-dominated areas and the Middle East region. HR 6848 is a related bill.

11. S Res 51

(Jan. 22—Eastland—Ref. to Rules & Administration Committee)

This resolution authorizes an investigation of immigration and naturalization problems, with a report required from the Judiciary Committee (or its subcommittee) no later than January 31, 1958, together with legislative recommendations.

12. S Res 172

(Feb. 25—Report of Immigration Subcommittee, Judiciary Committee)

This report, originally authorized under S Res 84, 85th Congress, gives a factual picture of the immigration and naturalization cases which have been referred to Congress by statutory directive.

VII. Labor

1. S 1018

(Feb. 1—Smith—Ref. to Labor & Public Welfare Committee)

This bill amends the Fair Labor Standards Act of 1938 to provide for review by the Secretary of Labor of the minimum wage recommendations of industry committees.

The Committee requested a report from the Department of Labor on Feb. 4. HR 5993 (introduced Mar. 14 by McConnell) is a related bill.

2. HR 518

(Jan. 3—Alger—Ref. to Education & Labor Committee)

This bill amends the Davis-Bacon Act to establish a procedure for making wage determinations and to provide for judicial review of these wage determinations, as provided in the Walsh-Healey Act or Section 10 of APA.

3. HR 3212

(Jan. 17—Bosch—Ref. to Education & Labor Committee)

This bill amends the Labor Management Act of 1947 by giving the Federal District Courts jurisdiction to try, without a jury, unfair labor practice cases affecting commerce.

4. HR 5332

(Feb. 26—Holland—Ref. to Education & Labor Committee)

This bill would amend section 2(2) of the National Labor Relations Act by striking out the words "on any corporation or association operating a hospital if no part of the net earnings inures to the benefit of any private shareholder or individual".

5. HR 4374

(Feb. 5—Chudoff—Ref. to Education & Labor Committee)

HR 4664

(Feb. 11—Perkins—Ref. to Education & Labor Committee)

This bill repeals the Taft-Hartley Labor Management Relations Act of 1947 and reenacts the Wagner National Labor Relations Act, with certain technical modifications.

6. S 1629

(March 18—Knowland—Ref. to Finance Committee)

This bill provides for judicial review of administrative findings of the Secretary of Labor under Sections 303 and 304 of the Social Security Act and Sections 3303, 3304, and (new) 3309 of the Federal Unemployment Tax Act. The proposed change would make it possible for a State to petition for judicial review of the Secretary's finding "to determine the matter on its merits on the basis of the entire record, [with the court] . . . exercising its independent judgment, any provision of the APA to the contrary notwithstanding."

7. HR 6432

(March 27—Ayers—Ref. to Education & Labor Committee)

This bill would amend Section 6 of the National Labor Relations Act by adding the following subsection: "(b) (1) The Board, in its discretion, may decline to assert jurisdiction over any labor disputes where, in the opinion of the Board, the effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. (2) Nothing in this Act shall be deemed to prevent or bar any agency, or the courts of any State or Territory, from assuming and exercising jurisdiction over labor disputes or classes of labor disputes over which the Board would decline, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

VIII. Maritime

1. HR 482

(Jan. 3—Thompson—Ref, to Government Operations Committee)

This bill establishes an independent Federal Maritime Board of three members and amends specifically Reorganization Plan No. 21 of May 24, 1950.

IX. Practice of Law

1. HR 818

(Jan. 3—Multer—Ref. to Judiciary Committee)

This bill would permit members of the Bar of the United States Supreme Court to practice before all Federal Courts without further qualification.

2. HR 820

(Jan. 3—Multer—Ref. to District of Columbia Committee)

This bill provides in Section 1 that any person who has been admitted to practice before any "court of any State, Territory, or Possession of the United States" would be entitled to open an office and engage in the general practice of law in the District of Columbia.

Section 2 relates to the activities of real estate brokers, who, although not members of the Bar, prepare deeds, deeds of trust, assignments, leases, etc. and exact fees for such service.

3. HR 1220

(Jan. 3—Reed—Ref. to Ways & Means Committee)

This bill provides "That the Secretary of the Treasury shall by regulations prescribe, to the extent that he considers practicable and desirable, qualifications, rules of practice, and standards of ethical conduct applicable to persons who assist taxpayers in determination of their Federal tax liabilities with the Internal Revenue Service: *Provided,* That no person shall be denied the right to engage in such activities solely because he is not a member of any particular profession or calling."

4. HR 261

(Jan. 3—Keating—Ref. to Judiciary Committee)

HR 3543

(Jan. 23—Walter—Ref. to Judiciary Committee)

These bills would permit members of the Bar to practice before administrative agencies without further qualification.

5. HR 283

(Feb. 3—Keating—Ref. to Judiciary Committee)

This bill supplements Title 5 of USC to prohibit or limit the appearance of a former Government employee before the agency to which he was previously attached.

6. HR 309

(Jan. 7—Williams—Ref. to Post Office & Civil Service Committee)

This bill amends 18 USC 284, relating to the disqualification of former officers and employees of the Government in matters connected with their former office or employment.

7. HR 6580

(April 2—Walter—Ref. to Judiciary Committee)

This bill would add Section 2392 to Chapter 115 of Title 18 of USC and prohibit members of the Communist Party or any other organization advocating the violent overthrow of duly authorized State or Federal Governments from appearing as counsel in administrative or Congressional proceedings.

X. Transportation

1. S 1383

(Feb. 26—Magnuson—Ref. to Interstate and Foreign Commerce Committee)

This bill amends the permit provisions of part IV (relating to freight forwarders) of the Interstate Commerce Act.

2. H Res 99

(Jan. 14—Harris—Ref. to Rules Committee)

This resolution would specifically authorize the Committee on Interstate and Foreign Commerce to investigate and study matters within its jurisdiction, including the following: competition between various modes of transportation; measures for increased safety; civil aviation; availability of channels for allocation for radio and television; adequacy of the protection to investors afforded by the disclosure and regulatory provisions of the Securities Act.

3. HR 5664

(March 6—Harris—Ref. to Interstate & Foreign Commerce Committee)

S 1490

(March 5—Magnuson—Ref. to Interstate & Foreign Commerce Committee)

These bills would amend part II of the ICC Act to require the filing of statements by motor carriers subject only to the safety and hours of service regulations of the Commission.

4. HR 5663

(March 6—Harris—Ref. to Interstate & Foreign Commerce Committee)

This bill would increase the penalties for violation of certain statutes administered by the Interstate Commerce Commission.

5. HR 5662

(March 6—Harris—Ref. to Interstate & Foreign Commerce Committee)

This bill would amend parts II and III of the Interstate Commerce Act to authorize the Commission to grant temporary authorities and approvals beyond a period of 180 days.

6. HR 5661

(March 6—Harris—Ref. to Interstate & Foreign Commerce Committee)

This bill would amend part II of the Interstate Commerce Act to clarify and make certain the authority of the Interstate Commerce Commission to issue temporary, or term, certificates of public convenience and necessity.

7. HR 5660

(March 6—Harris—Ref. to Interstate & Foreign Commerce Committee)

This bill would amend subsection (c) of section 208 of the Interstate Commerce Act to read as follows: "Any common carrier by motor vehicle transporting passengers under a certificate issued under this part on or before June 1, 1957, may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed."

8. HR 5524

(March 4—Wolverton—Ref. to Interstate & Foreign Commerce Committee)

HR 5523

(March 4—Harris—Ref. to Interstate & Foreign Commerce Committee)

These bills would amend section 15a(2) of the Interstate Commerce Act by adding the following paragraph: "In the exercise of its power to determine and prescribe just and reasonable rates for carriers subject to this Act, the Commission shall not consider the effect of such rates on the traffic of any other mode of transportation; or the relation of such rates to the rates of any other mode of transportation; or whether such rates are lower than necessary to meet the competition of any other mode of transportation."

9. HR 5521

(March 4—Harris—Ref. to Interstate & Foreign Commerce Committee)

HR 5522

(March 4—Wolverton—Ref. to Interstate & Foreign Commerce Committee)

These bills contain comprehensive legislative proposals to amend the Interstate Commerce Act and are entitled the "Transportation Act of 1957".

10. HR 5331

(Feb. 26—Harris—Ref. to Interstate & Foreign Commerce Committee)

This bill contains several technical amendments to section 212(a) of the Interstate Commerce Act.

11. S 1386

(Feb. 26—Magnuson—Ref. to Interstate & Foreign Commerce Committee)

This bill would authorize the Interstate Commerce Commission to prescribe rules, standards and instructions for the installation, inspection, maintenance and repair of train brakes.

12. S 1384

(Feb. 26—Magnuson—Ref. to Interstate & Foreign Commerce Committee)

This bill would amend section 203(a)(15) of the Interstate Commerce Act by revising the definition of contract carrier by motor vehicle.

13. HR 2855

(Jan. 14—Bosch—Ref. to Interstate & Foreign Commerce Committee)

This bill would amend section 902(a) of the Civil Aeronautics Act of 1938 so that the penalties provided in that section would apply to violations of civil aeronautics safety regulations.

Cf. HR 8890, 84th Congr.; hearings held Feb. 1956.

14. S 1380

(Feb. 26—Magnuson—Ref. to Interstate & Foreign Commerce Committee)

This bill would amend, in certain technical respects, the civil penalty provisions contained in section 901(a) of the Civil Aeronautics Act of 1938.

15. H J Res 297

(April 8—Taylor—Ref. to Interstate & Foreign Commerce Committee)

This bill creates a Federal Vehicle Commission to study the advisability of uniform laws, etc., in this field.

16. H Doc 150

(April 11—Report of Interstate & Foreign Commerce Committee)

This document contains the President's proposal for air traffic safety, including the establishment of an Airways Modernization Board.

17. H Res. 191

(March 11—Harris—Ref. to Administration Committee)

This resolution provides funds for an investigation by the Interstate and Foreign Commerce Committee of such Federal regulatory agencies as ICC, FPC, FTC, FCC, SEC, etc.

The resolution was agreed to in the House on April 11 by a vote of 225 to 143. It implements H Res 99, *supra.*

XI. Treasury Department

1. HR 6794

(April 10—Gubser—Ref. to Ways & Means Committee)

This bill would amend Chapter 80, Subchapter A of the Internal Revenue Code of 1954 to provide that the Secretary of the Treasury shall be bound by precedent decisions of the U. S. Supreme Court, a Federal Court of Appeals, the U. S. Tax Court, a Federal District Court, or the U. S. Court of Claims.

XII. Veterans and Military

1. HR 272

(Jan. 3—Keating—Ref. to Judiciary Committee)

This bill provides for judicial review by "any person aggrieved by any final decision of the Administrator of Veterans' Affairs, which has been rendered by the Board of Veterans Appeals".

2. HR 6073

(March 18—Bennett—Ref. to Armed Services Committee)

This bill amends 10 USC 1552 by providing that an "applicant for correction of a military record shall be afforded an opportunity for a hearing before the appropriate board," with a record being made of the board proceeding and with the board making its conclusion in writing, together with the facts "which substantiate such decision."

Judicial review of these board decisions will be by petition filed with the United States Court of Claims, with its decision being final.

"The decision of the court shall be on the basis of the record before the court; however, for good cause shown, the court may permit the introduction of additional evidence." If the administrative decision is found to be supported by a preponderance of evidence, the conclusion will be sustained.

3. HR 4746

(Feb. 14—Bennett—Ref. to Judiciary Committee)

This bill confers jurisdiction on the United States Court of Appeals for the District of Columbia to review decisions of the Board of Veterans Appeals, concerning claims for benefits and payments. "The findings of fact by the Board, unles contrary to the preponderance of the evidence, shall be conclusive."

The bill also provides that "The court may determine and allow such reasonable fees as it may deem proper for services rendered by an attorney for any private party to proceedings."

4. HR 6726

(April 8—Rees—Ref. to Post Office & Civil Service Committee)

This bill amends the Veterans Preference Act by establishing a system of appeals from adverse agency actions.

5. HR 6474

(March 28—Rees—Ref. to Post Office & Civil Service Committee)

This bill establishes a Veterans Preference Appeals Office as an independent office, responsible only to Congress.

6. HR 6990

(April 17—Macdonald—Ref. to Armed Services Committee)

This bill amends Section 207 of the Legislative Reorganization Act of 1946 by establishing Boards of Correction of Military or Naval Records to consider evidence about character and conduct in civilian life after military discharge or dismissal in ruling on the propriety of correcting discharge or dismissal records. Dishonorable military discharges, resulting from a general court martial sentence, are specifically excluded under this proposal. The bill also touches on the problem of veterans' benefits.

THE ABA SPECIAL COMMITTEE'S FINAL (APRIL 13, 1957) DRAFT OF PROPOSED NEW CODE OF ADMINISTRATIVE PROCEDURE

DRAFT OF A BILL

To re-Codify, with certain amendments thereto, Chapter 19 of Title 5 of the United States Code, "Administrative Procedure"

Title

SEC. 1000. Secs. 1001 to 1011, inclusive of this Act shall constitute the Code of Federal Administrative Procedure and may be cited as such.

Definitions

SEC. 1001. As used in this Act, except where the context clearly indicates otherwise—

(a) AGENCY—'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts of the United States, the Tax Court of the United States, the Court of Military Appeals or the governments of the possession, territories, commonwealths, or the District of Columbia. Except as to the requirements of section 1002 of this Act, functions of courts-martial and military commissions, and military or naval authority exercised in the field in time of war or in occupied territory, shall be excluded from the operation of this Act. Except as to the requirements of sections 1002 and 1003 of this Act, arbitration and mediation functions shall be excluded from the operation of this Act. No agency or function shall be exempt from any provision of this Act, except by express statutory reference hereto.

(b) PERSON AND PARTY—'Person' includes individuals, partnerships, corporations, associations, and public or private organizations of any character other than agencies. 'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding; but nothing herein shall prevent an agency from admitting any person or agency as a party to an agency proceeding for limited purposes.

(c) AGENCY RULE AND RULE MAKING—'Rule' means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy, or setting forth the procedure or practice requirements of any agency. 'Rule making' means agency process for the formulation, amendment or repeal of a rule.

(d) AGENCY ORDER, ADJUDICATION AND OPINION—'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) by any agency in any matter other than rule making. 'Adjudication' means agency process for the formulation, amendment, or repeal of an order, and includes licensing. 'Opinion' means the statement of reasons, findings of fact and

conclusions of law, in explanation or support of an order.

(e) Agency License and Licensing—'License' includes the whole or any part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission.' 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, limitation or modification of a license, and the prescription or requirement of terms, conditions, or standards of conduct thereunder.

(f) Agency Sanction and Relief—'Sanction' includes the whole or any part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person, (2) withholding of relief, (3) imposition of any form of penalty or fine, (4) destruction, taking, seizure, barring access to, or withholding of property, (5) assessment of damages, reimbursement, restitution, compensation, costs, charges or fees, (6) requirement, revocation, or suspension of a license, or the prescription or requirement of terms, conditions, or standards of conduct thereunder, or (7) other compulsory or restrictive action. 'Relief' includes the whole or any part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege or remedy, (2) recognition of any claim, right, immunity, privilege, exemption, exception, or remedy, or (3) any other action upon the application or petition of, and beneficial to, any person.

(g) Decision—'Decision' means the determinative action in adjudication, and includes order, opinion, sanction and relief. 'Initial Decision' means a decision made by a presiding officer which will become the action of the agency unless reviewed by the agency. 'Intermediate Decision' means a recommended decision in a rule-making proceeding made by any duly authorized official of the agency.

(h) Agency Proceeding and Action—'Proceeding' means any agency process for any rule or rule making, order or adjudication, or license or licensing. 'Action' includes the whole or any part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Public Information

Sec. 1002. In order to provide more adequate and effective information for the public—

(a) Organization, Rules, and Forms—Every Agency shall separately state and promptly file for publication in the Federal Register and for codification in the Code of Federal Regulations: (1) descriptions of its central and field organization, including statements of the general course and method by which its functions are channeled and determined, delegations by the agency of final authority, and the established places at which, and the methods whereby, the public may obtain information or make submittals or requests; (2) all procedural rules; (3) all other rules; (4) descriptions of all forms available for

public use and instructions relating thereto, including a statement of where and how such forms and instructions may be obtained; and (5) every amendment, revision, and repeal of the foregoing.

(b) Alternative Methods—An agency may, pursuant to a published rule use an alternative method of publishing the information specified in subsection (a) or of communicating it to all interested persons, when to do so will achieve economy and expedite dissemination of information to the public. No information published by such alternative method shall be relied upon or cited against any person who has not received prior, reasonable, and actual notice thereof.

(c) Orders and Opinions—Every agency shall promptly publish its orders and opinions or make them available to the public in accordance with published rule stating where and how they may be obtained or examined.

(d) Public Records—Every agency shall promptly make available to the public, in accordance with a published rule stating where and how such records may be obtained or examined, all matters initiating or placed of record in agency proceedings, including but not limited to docket pleadings, evidence, exhibits, reports, and actions taken therein, and all other records, files, papers and documents, submitted to or received by an agency, connected with the operations of the agency, and all records of action by the agency thereon, except as the agency by published rule finds that withholding is required by subsection (f) hereof or that the document relates solely to matters of internal management.

(e) Effect of Failure to Publish—No rule, order, opinion, or public record shall be relied upon or cited against any persons unless it has been duly published or made available to the public in accordance with this section. No person shall in any manner be required to resort to organization or procedure not so published.

(f) Exemptions—The provisions of this section shall not require disclosure of subject matter which is (1) specifically exempt from publication by statute, (2) required to be kept secret in the protection of the national security, (3) submitted in confidence pursuant to statute or agency rule or direction, or (4) the disclosure of which would be a clearly unwarranted invasion of personal privacy. Nothing contained in this section shall be deemed to authorize the withholding of information except as specifically stated in this subsection.

Rule Making

Sec. 1003. In order to establish procedures for rule making by agencies and to accord interested persons an opportunity to participate therein—

(a) Notice—Notice of proposed rule making shall be published in the Federal Register and shall state (1) the time, place, and nature of public rule making proceedings, which shall not be held less than 20 days after such publication, (2) the authority under which the rule is proposed, and (3) either the terms or the substance of the

proposed rule, or a description of the subjects and issues involved. A notice of proposed rule making shall not be effective after one year from date of publication, unless extended by renewed publication.

(b) PROCEEDINGS — Each agency shall adopt and separately state for publication in the Federal Register rules specifying the procedures whereby interested persons may participate in rule making. Whenever rule-making is initiated, public announcement of the initiation may be given and opportunity afforded interested persons to submit views or otherwise participate informally in conferences on the proposals under consideration, for publication in the Federal Register. After notice of proposed rule making has been published in the Federal Register, the agency shall afford interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments, with opportunity to present the same orally unless the agency deems it unnecessary. The agency shall fully consider all submissions. Except with regard to rules of procedure, the agency shall, when requested by an interested person, issue a concise statement of the matters considered in adopting or rejecting the rule and the reasons therefor. Where rules are required under the Constitution or by statute to be made on a record after opportunity for hearing, the proceedings shall also be in conformity with sections 1006 and 1007 of this Act, except that the provision in section 1005(c) requiring separation of functions shall not be applicable and that, in lieu of an initial decision pursuant to section 1007, an intermediate decision may be issued which shall be subject to exceptions before promulgation of the rule. Each agency shall maintain a rule-making docket showing the current status of published proposals for rule making.

(c) EFFECTIVE DATES—The required publication by any agency of any rule, other than one which solely grants or recognizes exemption or relieves restriction, shall be made not less than 20 days prior to the effective date thereof, except where the agency finds that timely execution of its functions imperatively requires the rule to become effective within a shorter period and publishes its finding together with a statement of the reasons therefor, with the rule.

(d) TEMPORARY AND EMERGENCY RULES—Temporary or emergency rules may be adopted without compliance with the procedures prescribed in subsection (b) above, and with less than 20 days' notice prescribed in subsection (a) above (or where circumstances imperatively require, without notice) where an agency finds that (1) immediate adoption of the rule is imperatively necessary for the preservation of public health, safety, or welfare, or (2) compliance with the requirements of this section would be contrary to the public interest. Such findings and a statement of the reasons for the action shall be published with the rule in the Federal Register. Temporary or emergency rules shall have effect for not more than six months from the adoption thereof unless extended in

compliance with subsections (a) and (b) of this section.

(e) PETITIONS—Every agency shall accord all interested persons the right to petition for the issuance, amendment, or repeal of a rule. Where the agency does not undertake rule making on the petition, it shall promptly state and transmit to the petitioner its reasons therefor. Whenever an agency undertakes rule making, all related petitions for the issuance, amendment or repeal of the rule shall be considered and acted upon in the same proceeding. The petition and the action taken by the agency, or its statement of the reasons for not doing so, shall be matters of public record.

(f) EXEMPTIONS—This section shall not require notice of or public participation in rule making (1) required to be kept secret in the protection of the national security, (2) relating to public property, loans, grants, benefits, or contracts to the extent that the agency finds and publishes, with a statement of supporting reasons, that such public participation would occasion delay or expense disproportionate to the public interest; or (3) relating solely to internal management or personnel of the agency.

Adjudication

SEC. 1004. In order that there may be a fair determination in every case of adjudication—

(a) FORMAL ADJUDICATION—In all such proceedings in which an opportunity for agency hearing is required under the Constitution or by statute, the parties shall be entitled to a hearing and decision in conformity with sections 1006 and 1007 of this Act. Where time, the nature of the proceeding, and the public interest permit, the agency shall afford all interested persons an opportunity, in advance of the hearing, to submit offers for the adjustment or settlement of the controversy, or for limitation of the issues. Persons entitled to notice of the hearings shall be given timely notice of (1) the time, place, and nature thereof, (2) the legal authority and jurisdiction under which it is to be held, and (3) the matters of fact and law asserted. Pleadings, including the initial notice, shall conform with the practice and requirements of pleading in the United States district courts, except to the extent that the agency finds conformity impracticable and otherwise provides by published rule. In fixing the times and places for proceedings, due regard shall be had for the convenience and necessity of the parties and their representatives. The parties to a hearing shall be entitled to submit and to have considered proposals for the settlement or adjustment of the controversy.

(b) INFORMAL ADJUDICATION—In all cases of adjudication not covered by subsection (a) and affecting private rights, claims, or privileges including but not limited to matters covering (1) proprietary functions such as the use or disposition of public property, (2) public contracts, and (3) determinations based upon inspections, tests or examinations, decisions of subordinate officers may by rule be made subject to re-

view within the agency by the agency or designated boards or superior officers. If requested, the reviewing authority shall furnish to a party a statement of the reasons for its decision. The decision of the reviewing authority or, if the agency fails to establish an intra-agency review procedure, the decision of the subordinate officer shall, subject to section 1009(a), constitute agency action subject to judicial review, in which case the record on review shall be made by trial in the reviewing court.

(c) EMERGENCY ORDERS—Nothing contained in this Act shall affect existing powers to issue emergency orders where the agency finds, and states of record the reasons for so finding, that (1) immediate issuance of the order is imperatively necessary for the preservation of public health, safety, or welfare, and (2) observance of the requirements of this section would be contrary to the public interest. Any person against whom an emergency order is issued, who would otherwise be entitled to a hearing pursuant to subsection (a) hereof, shall be entitled upon request to an immediate hearing in accordance with this Act, in which proceeding the agency shall be deemed the moving party.

Auxiliary Procedural Matters

SEC. 1005. (a) INVESTIGATIONS—No process, requirement of a report, inspection, or other investigatory act or demand shall be initiated, issued, made, or enforced by any agency in any manner or for any purpose unless it is within the jurisdiction of the agency and the authority conferred by statute. Every person compelled to testify or to submit data or evidence to any agency shall be entitled to the benefit of counsel and to retain or, on payment of lawfully prescribed costs, to procure, a copy of the transcript of such testimony, data, or evidence. Upon a showing of irreparable injury, any federal court of competent jurisdiction is authorized to restrain, in accordance with the provisions of section 1009(g), action clearly beyond the constitutional or statutory jurisdiction or authority of the agency, and to restrain any other act threatened or continuing contrary to the provisions of this subsection or to compel acts required hereby. Costs and reasonable attorneys' fees shall be imposed in favor of any prejudiced party, including the United States, if the court finds that a proceeding by any petitioner contesting the jurisdiction of the agency is frivolous or brought for the purpose of delay.

(b) SUBPOENAS—Subpoenas shall be issued without discrimination between public and private parties. The agency may, by rule, require a statement or showing of general relevance and reasonable scope of evidence sought. Any person subject to a subpoena may, before compliance therewith and upon timely petition, obtain from any federal court of competent jurisdiction a ruling as to the lawfulness thereof. Such suit may be brought in the judicial district in which the subpoena is served or wherein the defendant resides. The court shall quash the subpoena or similar process or demand to the extent that it is found to be unreasonable in terms, irrelevant in

scope, beyond the jurisdiction of the agency, not competently issued, or otherwise not in accordance with law. In any proceeding for enforcement, the court shall sustain such subpoena to the extent that it is found to be in accordance with law and shall issue an order requiring the appearance of witnesses or the production of data within a reasonable time, under penalty or punishment for contempt in case of contumacious failure to comply with the order of the court.

(c) Separation of Functions—No presiding or deciding officer acting pursuant to section 1006 of this Act shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for any agency. Except upon notice and opportunity for all parties to be present or to the extent required for the disposition of ex parte matters as authorized by law, no such presiding or deciding officer or agency or member of an agency acting pursuant to sections 1006 and 1007 of this Act shall consult with any person or party on any issue of fact or law in the proceeding, *except that,* in analyzing and appraising the record for decision, any agency member may (1) consult with other members of the agency in cases in which the agency is making the decision, (2) have the aid and advice of one or more personal assistants, (3) have the assistance of other employees of the agency who have not participated in the proceeding in any manner, who are not engaged for the agency in any investigative functions in the same or any current factually related case and who are not engaged for the agency in any prosecutory functions.

(d) Expedition and Denials—Every agency shall proceed with reasonable dispatch to conclude any matter presented to it with due regard for the convenience of the parties or their representatives, giving precedence to rehearing proceedings after remand by court order. Prompt notice shall be given of the refusal to accept for filing or the denial in whole or in part of any written application or other request made in connection with any agency proceeding or action, with a statement of the grounds therefor. Upon application made to any federal court of competent jurisdiction by a party to any agency proceeding or by a person adversely affected by agency action, and a showing to the court that there has been undue delay in connection with such proceeding or action, the court may direct the agency to decide the matter promptly. In any such case the agency may show that the delay was necessary and unavoidable.

(e) Declaratory Orders—Every agency shall provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders to terminate controversies, or to remove uncertainties as to the applicability to the petitioners of any statutory provisions or of any rules or orders of the agency. The order disposing of the petition shall constitute agency action subject to judicial review.

(f) National Security—In the case of agency proceedings or actions which in-

volve the national security of the United States and for that reason must be kept secret, the agency shall provide by rule for such procedures parallel to those provided in this Act as will effectively safeguard and prevent disclosure of classified information to unauthorized persons with minimum impairment of the procedural rights which would be available if classified information were not involved.

Hearings

SEC. 1006. In order to assure that all parties to agency hearings governed by section 1004(a) shall be accorded due process of law—

(a) PRESIDING OFFICERS—At the taking of evidence only one of the following may preside: (1) the agency, (2) one or more members of the body which comprises the agency, if otherwise authorized by law, (3) a hearing commissioner, or (4) a board specifically authorized by statute to conduct designated classes of proceedings. All evidence, whether written or oral, shall be submitted to and received and considered by the presiding officer. The functions of all presiding officers, as well as officers participating in decisions in conformity with this Act, shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified, and, upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of any such officer, he shall forthwith determine the matter as part of the record in the case. In any case in which a presiding officer is disqualified or otherwise becomes unavailable because of extended illness or absence, another presiding officer may be assigned to continue with the case, unless substantial prejudice to any party is shown to result therefrom.

(b) HEARING POWERS—Presiding officers shall have authority to (1) administer oaths and affirmations; (2) sign and issue subpoenas; (3) rule upon offers of proof and receive evidence; (4) permit or require depositions or discovery upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the proceeding, and dispose of motions relating to the discovery and production of relevant documents and things for inspection, copying, or photographing; (5) regulate the course of the hearings, set the time and place for continued hearings, and fix the time for the filing of briefs and other documents; (6) direct the parties to appear and confer to consider the simplification of the issues, admissions of fact or of documents to avoid unnecessary proof, and limitation of the number of expert witnesses, and issue appropriate orders which shall control the subsequent course of the proceeding; (7) dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground; (8) dispose of motions to amend, or to dismiss without prejudice, applications, and other pleadings; (9) dispose of motions to intervene, procedural requests or similar matters; (10) make initial decisions; (11) reprimand or exclude from the hearing any person for any improper or indecorous conduct in their

presence; and (12) take any other action authorized by agency rule consistent with this Act or in accordance, to the extent practicable, with the procedure in the United States district courts.

(c) Interlocutory Appeals—A presiding officer may certify to the agency, or allow the parties an interlocutory appeal on, any material question arising in the course of a proceeding, where he finds that to do so would prevent substantial prejudice to any party or would expedite the proceeding. The presiding officer or the agency may thereafter stay the proceeding if necessary to protect the substantial rights of any party. The agency, or such one or more of its members as it may designate, shall determine the question forthwith, and further proceedings shall be governed accordingly. No interlocutory appeal shall otherwise be allowed, except by order of the agency upon a showing of substantial prejudice and after a denial of such appeal by the presiding officer.

(d) Evidence—Except as otherwise provided by statute, the proponent of an order shall have the burden of proof, and every party to the proceeding shall have the right to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Subject to these rights and requirements, where a hearing will be expedited and the interests of the parties will not be substantially prejudiced thereby, a presiding officer may receive all or part of the evidence in written form. In rule-making subject to this section and in cases of adjudication involving the approval of prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, or practices bearing upon any of the foregoing, any reliable and probative evidence shall be received. In all other cases, the rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil non-jury cases in the United States district courts. The complete transcript of the record shall be made available to the parties upon payment of lawfully prescribed costs which shall be equitably divided among the parties and the agency.

(e) Official Notice—Agencies may take notice of judicially cognizable facts and in addition may take official notice of general, technical, or scientific facts within their specialized knowledge. Such additional official notice of a material fact beyond the evidence appearing in the record may be taken only if (1) the fact so noticed is specified in the record or is brought to the attention of the parties before final decision, and (2) every party adversely affected by the decision is afforded an opportunity to controvert the fact so noticed.

Decisions and Agency Review

Sec. 1007. In cases in which a hearing is required to be conducted in conformity with section 1006 of this Act—

(a) Submittals and Decisions—Prior to each decision by an agency which presides, or the initial decision by a presiding officer in an agency proceeding, the parties to the proceeding shall be afforded an opportunity to submit (1) proposed findings of fact and conclusions of law, and (2) both written and oral argument. The record shall show the ruling upon each material finding or conclusion presented. Upon review of any initial decision, the agency shall, by rule, afford the parties an opportunity to submit (1) written exceptions to the decision and (2) written briefs. Upon review of initial decisions, a party shall be granted opportunity for oral argument upon request, unless the agency deems it inappropriate or unwarranted. All decisions and initial decisions shall include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) the appropriate rule, order, sanction, relief, or denial thereof; and such decisions and initial decisions shall become a part of the record. The grounds for any decision shall be within the scope of the issues presented on the record.

(b) Record for Decisions—For the purpose of the decision by the agency which presides, or the initial decision by a presiding officer, the record shall include (1) all pleadings, motions, and intermediate rulings, (2) evidence received or considered, including testimony, exhibits, and matters officially noticed, (3) offers of proof and rulings thereon, and (4) the findings of fact and conclusions of law proposed by the parties. No other material shall be considered by the agency or by the presiding officer. In cases in which the agency has presided at the reception of the evidence, the agency shall prepare, file, and serve upon the parties its decision. In all other cases the presiding officer shall prepare and file an initial decision which the agency shall serve upon the parties, except where the parties to the proceeding, with the consent of the agency, expressly waive their right to have an initial decision rendered by such officer. In the absence of an appeal to the agency or a review upon motion of the agency within the time provided by rule for such appeal or review, every such initial decision shall thereupon become the decision of the agency.

(c) Record for Review by Agency—For the purpose of review by the agency of the initial decision of the presiding officer, the record shall include (1) all matters constituting the record upon which the decision of the presiding officer was based, (2) the rulings upon the proposed findings and conclusions, (3) the initial decision of the presiding officer, and (4) the exceptions and briefs filed. No other material shall be considered by the agency upon review. By consent of the parties, the records for review may be reduced or the issues therein limited. The grounds of the decision shall be within the scope of the issues presented on the record. The findings of evidentiary fact, as distinguished from ultimate con-

clusions of fact, made by the presiding officer shall not be set aside by the agency on review of the presiding officer's initial decisions unless such findings of evidentiary fact are contrary to the weight of the evidence. The agency either may remand the case to the presiding officer for such further proceedings as it may direct or it may affirm, set aside, or modify the order or any sanction or relief entered thereon, in conformity with the facts and the law.

Licensing

SEC. 1008. (a) PROCEEDING—In any case in which application is made for a license required by law, the agency, with due regard for the rights and privileges of all interested persons, shall set and conduct the proceedings in accordance with this Act unless otherwise required by law.

(b) TERMS AND CONDITIONS—Terms, conditions or requirements limiting any license shall be valid only if reasonably necessary to effectuate the purposes, scope or stated terms of the statute pursuant to which the license is issued or required.

(c) REVOCATION, SUSPENSION, AND MODIFICATION—No revocation, suspension, annulment, limitation or modification by any agency of a license shall be lawful unless, before institution of agency proceedings therefor, the agency shall have (1) given the licensee notice in writing of facts or conduct that may warrant such action, (2) afforded the licensee opportunity to submit written data, views, and arguments with respect to such facts or conduct, and (3) except in cases of willful violation, given the licensee a reasonable opportunity to comply with all lawful requirements. Where the agency finds that the licensee has been guilty of willful violation, or that the public health, safety, or welfare imperatively requires emergency action, and incorporates such findings in its order, it may institute revocation proceedings without compliance with the provisions of this subsection or it may summarily suspend the license pending proceedings for revocation which shall be promptly instituted and determined upon the request of any interested person.

(d) RENEWAL—In any case in which the licensee has made timely and sufficient application for the renewal of a license or for a new license for the conduct of a previously licensed activity of a continuing nature, the existing license shall not expire until (1) such application has been finally acted upon by the agency and, (2) if the application has been denied or the terms of the new license limited, judicial review has been sought or the time for seeking judicial review has elapsed.

Judicial Review

SEC. 1009. In order to assure a plain, simple, and prompt judicial remedy to persons adversely affected or aggrieved by agency action, and notwithstanding any limitation by statute on the minimum jurisdictional amount in controversy—

(a) REVIEWABLE ACTS—Every agency action made reviewable by statute and every other final agency action which is not sub-

ject to judicial review in an action brought by a person adversely affected or aggrieved shall, except as expressly precluded by Act of Congress hereafter enacted, be subject to judicial review under this Act. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable or the failure of any agency to comply with any provision of this Act shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by the statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise required by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(b) Standing to Seek Review—Any person adversely affected or aggrieved by any such reviewable agency action shall have standing to seek judicial review thereof, except where expressly precluded by Act of Congress hereafter enacted.

(c) Form of Action—A person so adversely affected or aggrieved may obtain judicial determination of the jurisdiction of the agency in a civil or criminal case brought by the agency, or in its behalf, for judicial enforcement of such agency action, regardless of the availability or pendency of administrative review proceedings with respect thereto, except where expressly precluded by Act of Congress. All other cases for review of agency actions shall be commenced by the filing of a petition for review in the United States district court of appropriate jurisdiction, except where a statute provides for judicial review in a specified court. Proceedings for review may be brought against (1) the agency by its official title, (2) individuals who comprise the agency, or (3) any person representing the agency or acting on its behalf in the matter sought to be reviewed in the judicial district where the defendant resides or wherein the act or omission complained of occurred. The petition shall state (1) the grounds upon which jurisdiction and venue are based, (2) the facts upon which petitioner bases the claim that he has been adversely affected or aggrieved, (3) the reasons entitling him to relief, and (4) the relief which he seeks.

(d) Interim Relief—Upon a finding that irreparable injury would otherwise result, (1) the agency, upon application therefor, shall postpone the effective date of the agency action pending judicial review, or (2) the reviewing court, upon application therefor and regardless of whether such an application previously shall have been made to or denied by any agency, shall issue all necessary and appropriate process to postpone the effective date of the agency action or to preserve the rights of the parties pending conclusion of the review proceedings.

(e) Record on Review—In every case of agency action subject to sections 1006 and 1007 of this Act, the record on review

shall include (1) all matters constituting the record for action or review by the agency, including the original or certified copies of all papers presented to or considered by the agency, except memoranda submitted to individual agency members by their personal assistants, and papers submitted by the independent advisory staff, (2) rulings upon exceptions, (3) the decision, findings, and action of the agency, and (4) as to alleged procedural errors and irregularities not appearing in the agency record, evidence taken independently by the court. In all other cases, the record on review shall be made by trial in the reviewing court.

(f) Decision on Review—If the court finds no error it shall affirm the agency action. If it finds that the agency action is (1) arbitrary or capricious, (2) a denial of statutory right, (3) contrary to constitutional right, power, privilege or immunity, (4) in excess of statutory jurisdiction, authority, purposes, or limitations, (5) not in accord with the procedures or procedural limitations of this Act or otherwise required by law, (6) an abuse or clearly unwarranted exercise of discretion, (7) based upon findings of fact that are clearly erroneous on the whole record in proceedings subject to sections 1006 and 1007 of this Act, (8) unsupported by the evidence in cases in which the record is made before the court, or (9) otherwise contrary to law, then in any such event the court shall hold unlawful and set aside the agency action and shall (i) restrain the enforcement of the order or rule under review, (ii) compel any agency action to be taken which has been unlawfully withheld or unduly delayed, and (iii) afford such other relief as may be appropriate. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. In all cases under review the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

(g) Proceedings in Excess of Jurisdiction—Upon a showing of irreparable injury, any federal court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency. If the court finds that any proceeding contesting the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the petitioner in such proceeding costs and a reasonable sum for attorneys' fees (or an equivalent sum in lieu thereof) incurred by other parties, including the United States.

When any such case is brought, the Attorney General may file with the clerk of court a certificate that the case, in his opinion, is of general public importance. Said certificate shall be immediately furnished by said clerk to the chief judge of said court who shall upon receipt thereof

immediately designate a judge to hear and determine the case. The judge so designated shall set the case for hearing at the earliest practicable date and he shall cause the case to be in every way expedited. Said case shall have precedence on the calendar of the trial court and of the appropriate appellate courts and Supreme Court at every stage.

Limitations of Authority

SEC. 1010. In the exercise of any power, authority, or discretion by any agency or by any officer or employee thereof—

(a) AUTHORITY—No rule or order shall be issued except within the jurisdiction delegated to the agency and as authorized by law. Agency action shall not be deemed to be within the statutory authority and jurisdiction of the agency merely because such action is not contrary to the specific provisions of a statute.

(b) PUBLICITY—Agency publicity, which a reviewing court finds was issued to discredit or disparage a person under investigation or a party to an agency proceeding, may be held to be a prejudicial prejudging of the issues in controversy, and the court may set aside any action taken by the agency against such person or party or enter such other order as it deems appropriate.

General Provisions

SEC. 1011. (a) CONSTRUCTION AND EFFECT—All laws or portions thereof which are inconsistent, or conflict, with the provisions of this Act are hereby repealed, provided however that nothing in this Act shall be held to diminish the Constitutional rights of any person or to limit or repeal any additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. Every agency shall have all the powers necessary to enable it to carry out the provisions of this Act, including the authority to make and enforce rules thereunder. The courts shall have all the powers necessary to enable them to carry out the provisions of this Act. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly as amendment to this section. The affirmative requirements and specific prohibitions of this Act shall be broadly construed, and exemptions from, and exceptions to, this Act shall be narrowly construed.

(b) SEPARABILITY—If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

(c) EFFECTIVE DATE—This Act shall supersede the Administrative Procedure Act of 1946 and take effect on the 180th day after the date of its enactment, but (1) Insofar as to the amendments made by this Act to the Administrative Procedure Act of 1946 provide for changes, requirements imposed by such changes shall not

be mandatory as to any agency proceeding with respect to which hearings under section 1006 have been commenced prior to the effective date of this Act; (2) the amendments made by this Act to section 1009 of the Administrative Procedure Act of 1946 (relating to judicial review of orders and decisions) shall not apply with respect to any action or appeal which is pending before any court on the effective date of this Act.

Repeal of Exemptions from Administrative Procedure Act

SEC. 1012. All laws or parts of laws in force on the 180th day after the date of enactment of this Act which, either expressly or impliedly, grant exemption from the provisions of the Administrative Procedure Act of 1946 are hereby repealed, including specifically the following parts of law:

1. Section 483 of the Federal Coal Mine Safety Act, 30 U. S. C.

2. Section 2027 of the Export Control Act of 1949, 50 U. S. C., appendix.

3. Section 2231 of the Atomic Energy Act of 1954, 42 U. S. C.

4. Section 5 of the Second Decontrol Act of 1947, 61 Stat. 323.

5. Section 501(b) of Public Law 155, 82nd Cong., 1st sess., 65 Stat. 364.

6. Section 1221 of the Renegotiation Act of 1951, 50 U. S. C., appendix.

7. Section 1642(i) of the International Wheat Agreement Act of 1949, 7 U. S. C.

8. Section 2159 of the Defense Production Act of 1950, 50 U. S. C., appendix.

9. Section 3 of Public Law 564, 82nd Cong., 2nd sess., 66 Stat. 732.

10. Section 463 of the Universal Military Training and Service Act, 50 U. S. C., appendix.

11. Sections 1881-1884 and 1891-1902 of the Housing and Rent Acts, 50 U. S. C. A., appendix.

12. Sections 1622 and 1641 of the Surplus Property Act of 1944, 50 U. S. C., appendix.

13. Sections 1822, 1830, and 1833 of the Veterans Emergency Housing Program, 50 U. S. C. A., appendix.

14. Sections 101, 103, and 105-125 of the Termination of War Contracts Act, 41 U. S. C. A.

15. Sections 1738, 1739, 1943 and 1744 of the War Housing Insurance Act, 12 U. S. C. A.

16. Sections 1226(a) and 1252 (b) of the Immigration and Nationality Act of 1952, 8 U. S. C. A. (to the extent that they authorize special procedures).

17. Section 401(b) of Public Law 534, 82nd Cong., 2nd sess., 66 Stat. 624.

JOINT REPORT OF THE COMMITTEE ON REORGANIZATION AND BY-LAWS AND THE SPECIAL COUNCIL COMMITTEE ON NOMINATIONS AND ELECTIONS

At its February 1957 meeting the Council authorized the Section Chairman to appoint a Special Policy Committee of three Council members to study, jointly with the Standing Committee on By-laws, the needs for revisions in the Section's By-laws governing the nominations, elections, and terms of office of Council members and officers of the Section. Joint committee meetings, with all appointed and regular members attending, were held on April 13 and May 25, 1957. On the latter date amendments to be proposed were discussed informally among the eight Council members who then attended the voluntary meeting called by the Section Chairman. The views developed in these meetings and in correspondence among the committee members are reflected in the By-laws amendments which are set out in the proposed Resolution attached hereto.

The suggested revisions are intended to meet comprehensively various needs for changes and clarifications which have been noted and discussed at recent meetings of the Council and the Section. A primary objective of the amendments is explicitly to provide opportunities for all interested Section members to participate effectively in nominating and electing Section officials. It is believed that the revised By-laws preclude future criticisms—such as have been heretofore expressed by some Section members—charging or implying that the choice of Section officers is made by an "Inner Temple" group in ignorance or in disregard of the wishes of the general Section membership.

The Joint Committee study disclosed some areas of needed revisions which were not specifically committed to us by the Council's directive. For example, the By-laws make no provision for regular or special Council meetings although they impose a forfeiture of office upon a Council member who fails to attend two successive meetings; the drafted amendments of Article VI cover the subject. In other instances the scope of the changes has been broadened in order to integrate the required amendments in the By-laws to avoid conflicts and ambiguities. The nature and effect of the several revisions are briefly summarized below.

Article III Amendments

Four sections of Article III are repealed and three revised sections are substituted; the repealed Section 6 becomes, in amended form, a new Section 8 in Article VI, thus logically grouping the provisions relating to Council duties and functions.

In Section 3 an official year is defined as extending from the close of one annual meeting to the close of the next annual meeting; certainty of meaning is thus assured in subsequent references to the election year as distinguished from the fiscal year (Article VIII, Section 1), the membership year (Article II, Section 1), and

the calendar year as used by the last sentence of Article III, Section 3. The only other change in Section 3 is the elimination of the unnecessary holdover provision, "until their successors which have been elected and qualified", because continuity and succession in official positions are otherwise assured.

Section 4 is shortened by eliminating the references to staggered terms which were necessitated in the 1955 adoption of the present section. Also, express provision is made for elections to fill vacancies, thus rounding out the vacant position election process which was inadequately covered by the By-laws as pointed out in the course of the 1956 annual election.

The amended Section 5 continues the existing prohibition against re-election of a full term elected Council member. This section adds a new eligibility requirement for election to an official position in the Section, *i.e.,* a year's membership in the Section.

Article IV Amendments

Article IV is entirely revised to require: early appointment of a Nominating Committee to be made by the Section Chairman after consultation with the Council; publication to Section members identifying the Nominating Committee; publication of the report of that Committee prior to the annual meeting; oral announcement of its report at the commencement of the Section meeting; announcement of a specified time when nominations from the floor may be made, and early announcement of the time and place when the election will be held. It is the considered view of all committee members that these—and related—revisions affirmatively proclaim and insure the right and opportunity for all interested Section members to participate actively in choosing their official representatives.

In Section 2, written ballot elections for contested positions are required, each position must be voted on separately to avoid "bullet ballot" and other complications, and a majority vote requirement with a runoff election provision is included.

Article VI Amendments

It is proposed to amend Section 3 of Article VI to clarify the authority of the Council to fill vacancies in its membership and in the other official positions of Chairman, Secretary, and Section Delegate. The proposed amendment of Section 3 was unanimously approved by the Council at its meeting in February of 1957. (Minutes pages 8 and 9)

New Sections 7 and 8 are added to Article VI. The Section 7 provision is entirely new and includes explicit requirements and provisions concerning the times and places of regular and special meetings of the Council. This subject has not heretofore been covered in the Section By-laws. The added Section 8 is a replacement and re-enactment with clarification of Section 6 of Article III in the present By-laws. The provision for an automatic vacancy when a Council member fails to

attend two successive meetings is preserved, but the resulting vacancy shall be filled by the Council only until the close of the next annual meeting. This subject is now covered in Article III, Section 6, which purports to allow the filling of a vacancy, "for the unexpired term"; this provision conflicts with the existing and proposed Section 3 of Article VI, and hence is repealed as pointed out above.

The Joint Committee recommends the adoption of the attached Resolution.

ROBERT M. BENJAMIN
EARL W. KINTNER
J. D. BOND, *Chairman,*
Special Council Committee

JESSE E. BASKETTE
PATRICIA H. COLLINS
LOUISA WILSON, *Chairman,*
Organization and By-laws Committee

PROPOSED RESOLUTIONS AMENDING THE BY-LAWS

RESOLVED THAT Articles III, IV, and VI of the By-laws of the Section of Administrative Law be amended in the following respects:

Article III, Section 3 is amended to read as follows:

Section 3. As used in Articles III, IV, and VI of these By-laws a year shall be deemed to commence at the close of the annual meeting of the American Bar Association and to end at the close of the next annual meeting. The Chairman, Vice-Chairman, and Secretary shall be nominated and elected each year in the manner hereinafter provided, and shall hold office for a term of one year. The Section Delegate shall be nominated and elected each even-numbered calendar year and shall hold office for a term of two years.

Article III, Section 4 is amended to read as follows:

Section 4. At each annual meeting four members of the Council shall be nominated and elected for terms of three years; in addition, there shall be nominated and elected a Council member to fill each existing vacancy who shall serve during the remainder of the term of such vacant position.

Article III, Section 5 is amended to read as follows:

Section 5. No person shall be eligible for nomination or election as an officer, Section Delegate, or a member of the Council unless he shall have been a member of the Section throughout the year in which the election is held. No member of the Council who is serving as an elected member and has served as such continuously for a period of three years shall be eligible for re-election as a member of the Council.

Article III, Section 6 IS REPEALED.

Article IV, Section 1 is amended to read as follows:

Section 1. At a time not later than the close of the mid-year meeting the Chairman, after consultation with the Council, shall appoint a Nominating Committee of three members of the Section who are not members of the Council, and he shall promptly there-

after announce the names of the members of the Committee in the Administrative Law Bulletin, or by other publication to Section members. The Chairman shall appoint a member to fill any vacancy that may arise thereafter in the Nominating Committee; a vacancy shall be deemed to exist for any Nominating Committee member who is not present at the annual meeting. The Nominating Committee shall make and report one nomination for each position which is to be filled by election at the annual meeting as provided in Article III of these By-laws. The report shall identify each nominee and shall include a brief statement of his activities in the Section and in the law profession generally. The Committee shall submit its report to the Chairman of the Section who shall cause it to be published in the Administrative Law Bulletin, or otherwise published to Section members, prior to the annual meeting. The Nominating Committee shall supplement its published report and action by making one nomination for each unanticipated vacancy, if any, that may arise prior to the beginning of the annual meeting of the Section. At the commencement of the first session of the annual meeting of the Section, the Section Chairman shall orally announce the report of the Nominating Committee, and, after a reasonable interval to be then fixed and announced by the Chairman, before the conclusion of that session, additional nominations for any specified position may be made from the floor; the nominator shall briefly identify the nominee as above provided with respect to the report of the Nominating Committee. Seconds to such nominations shall not be permitted. The Chairman shall then announce the time and place when the election will be held in conformity with Section 2 of this Article.

Article IV, Section 2 is amended to read as follows:

Section 2. All elections shall be held at the last session of the annual meeting and elections for contested positions shall be by written ballot unless otherwise ordered by unanimous consent of the Section members present. Each position to be filled by election shall be voted upon separately. Election shall be by a majority of the votes cast, and a runoff election to choose between the two leading candidates shall be held if a majority vote is not initially obtained.

The *Title* of *Article VI* is amended to read as follows:

Duties and Powers of the Council; Meetings.

Article VI, Section 3 is amended to read as follows:

Section 3. The Council during the interim between annual meetings of the Section, may fill vacancies in its own membership or in the offices of Secretary or Section Delegate, and, in the event of a vacancy in both the office of Chairman and Vice-Chairman, then in the office of Chairman. Members of the Council and officers so selected shall serve until the close of the next annual meeting of the Section, except in the case of the Section Delegate, who shall serve for the remainder of the term.

Article VI, Section 7 (New) is adopted as follows:

Section 7. The Council shall hold two regular meetings each year, the first to be held in connection with the mid-year meeting of the House of Delegates, and the second to be held prior to the annual meeting of the Section. Special meetings of the Council may be called upon reasonable notice by the Chairman with prior approval of a majority of the Council, and shall be so called upon written request by a majority of the Council.

Article VI, Section 8 (New) is adopted as follows:

Section 8. If any elected member of the Council shall fail to attend two successive meetings of the Council, the office held by such member shall be automatically vacated, and the vacancy shall be filled as provided in Section 3 of this Article and in Section 4 of Article III.

REPORT OF THE COMMITTEE ON AGRICULTURE

This Committee throughout the year has kept in touch with the work being done by the Drafting Committees, the Advisory Committee and the Special Committee engaged in the preparation of the new Federal Code of Administrative Procedure for introduction in Congress. Suggestions as to modifications of the several drafts relating largely to the provisions affecting "rule making" from time to time have been presented. These recommendations were in line with the views stated in the last annual report of this Committee. They arose out of the unusual impact which the proposed changes in rule making procedures might have on the effective and practical administration of important agricultural laws by the Department of Agriculture. This Committee adheres to the views which it expressed in its last report to the Section.

A number of agricultural bills have been presented to Congress and have been reviewed by the Committee. None of these bills which seemed likely of enactment at this session contained administrative procedural provisions except the Poultry Inspection Bill. We have reviewed this bill carefully and have reached the conclusion that it did not require the especial attention of the Section. The administrative procedures provided are substantially similar to those presently contained in the Packers and Stockyards Act, 1921, the Meat Inspection Act and in the Food, Drug and Cosmetic Act. In those acts the result of application of these procedures has seemed to be generally acceptable. In most instances review can be had in court proceedings where a trial de novo of the facts is permissible. The Act does permit interim effectiveness, pending review, of administrative orders issued under it. The Committee believes that this is essential or at least reasonable in matters relating to public health.

We have given the National Committee the assistance it has requested of us in reference to the bill having to do with compensation for the judicial officer of the Department of Agriculture. We desire to

express our appreciation of the careful manner in which Mr. Chisman Hanes, acting on behalf of the National Committee, has kept this Committee advised of the status and content of pending legislation affecting the Department of Agriculture.

Respectfully submitted,

COMMITTEE ON AGRICULTURE

By JOHN B. GAGE
Chairman

FREDERICK R. LEE
Vice-Chairman

REPORT OF THE AVIATION COMMITTEE ON POLITICAL INFLUENCE AND THE CIVIL AERONAUTICS BOARD

Recommendations

1. That the Administrative Law Section recommend to the Board of Governors that the Association, in cooperation with the Attorney General, members of Congress and members of regulatory agencies, form a special Commission to recommend ways and means of eliminating improper pressure by the legislative and executive branches of the Government on the decisions of regulatory agencies.

2. That the Civil Aeronautics Board amend its Rules of Practice prohibiting the appearance before it in formal proceedings of members of Congress but provide that all correspondence from all members of Congress to any Board member relating to any pending proceeding be placed in the appropriate public docket in a Congressional correspondence section.

Introduction

The Civil Aeronautics Board, like most regulatory agencies, is in an ambivalent position. On the one hand, it is considered "an arm of Congress" which has delegated to it the performance of legislative functions. On the other hand, both the Civil Aeronautics Act and the Administrative Procedure Act contemplate that it is a "quasi-judicial" body which shall conduct its proceedings in the manner comparable to the procedures employed by the courts.

In recent years the ambivalent status of the Board has become more apparent because of the increasing activities of members of Congress in formal proceedings pending before the Civil Aeronautics Board. For the calendar year 1956, 41 Senators and 70 Representatives appeared at oral arguments before the Board. The Board received approximately 400 letters for route cases from 70 Senators and 142 Representatives. While many of the letters were merely "reference" letters forwarding the views of constituents, they are nevertheless an index of Congressional activity in cases pending before the Board.

There is, of course, nothing improper *per se* about Congressional activity of this type. In route cases, in particular, the Board is dealing with the air service needs of communities. Certainly expression of the needs of a community is within the orbit of normal Congressional activity.

The appearance and letters, however, are merely the top of the iceberg. The more effective political pressure is below the surface. For example, private Congressional phone calls, particularly from legislators on the Commerce or Appropriations Committee, or from legislators with some influence on the appointment of Board members is far more effective.

No one knows the extent to which fair procedures have been imperiled by Congressional activity. In all probability the effective Congressional interference is rare. Most Senators and Congressmen are sensitive to the proprieties of interfering in the decisions of the Board. Most Board members are not responsive to Congressional pressure. In many cases, the pressures exerted by rival route applicants cancel each other out. But most practitioners before the Board are convinced that political pressures are employed and are effective in some cases and that the elimination of this pressure is important to fair decisions.

This is an exceedingly complex problem. It is, of course, obvious that the problem is not peculiar to the Civil Aeronautics Board but extends to all regulatory agencies. It is not confined to Congress but includes pressure from the Executive Branch of the Government. It does not involve a simple question of avoiding improper political influence on the decisions of an administrative agency, but the complex and subtle question of the proper relation of a regulatory agency to Congress and to the Executive arm of the Government. The Committee does not have either the resources or the prestige to deal intelligently with such a comprehensive and difficult problem. It is therefore recommending that this problem be handled by the Board of Governors of the American Bar Association as set forth in Reccommendation No. 1.

While the basic problems of political pressure are beyond the competence of the Committee, there are certain improvements in formal Board procedures which would strengthen its independence from pressure and improve the quasi-judicial quality of its proceedings. These improvements are discussed in Recommendation No. 2.

Recommendation No. 1

While the effect of political pressure on decisions of administrative agencies may well be exaggerated, there is no question that pressure is applied and that it does impede fair decisions by administrative tribunals. Moreover, it is self-generating. The use of political pressure by an applicant in one case leads to pressure by other applicants in other cases. Standards of behavior are reduced to the lowest common denominator. Altogether the present situation is serious enough to warrant action by members of the Bar to improve the standards of professional conduct and the quality and fairness of administrative decisions.

The Aviation Committee believes that effective action to cope with the problem of undue political influence on administrative agencies should be based on the following principles:

First: The initial action should be taken by the Board of Governors of the American Bar Association itself. Only the Board of Governors would have the prestige and the resources to do the job.

Second: The purpose should be to establish rules for the future rather than a recriminatory investigation of past practices.

Third: There should be full recognition of a legitimate interest by Congress and the Executive Branch of the Government in the proper administration of the statutes entrusted to regulatory agencies.

Fourth: The American Bar Association should seek the fullest participation of the Attorney General, of members of Congress, and of regulatory agencies. It may be desirable to establish a Commission similar to the Hoover Commission or to the Attorney General's Committee which led to the Administrative Procedure Act. Broad participation will increase the facilities available to investigate the facts, will bring insight from divergent points of view, and will enhance the prestige of the Commission so that its recommendation can be an effective force in improving administrative procedures.

Recommendation No. 2

A Congressman making a formal appearance before the Civil Aeronautics Board is generally appearing openly to support the legitimate desire of a city within his constituency for air service. Nevertheless, these appearances interfere with the proper functions of the Board for four reasons:

First: Congressional activity is increasingly directed towards support of the position of a particular applicant. These activities are generally rationalized on the ground that a particular carrier will best serve the needs of the cities involved or that a particular carrier is located in the Congressional district and the welfare of the carrier is important to the district. Nevertheless, in this area, the Congressional activity is less related to the legislative purpose of obtaining proper air service and becomes closer to the promotion of the interest of a private applicant.

Second: Congressional activity is self-breeding. Activity on the part of one applicant breeds activity by other applicants. Soon all applicants feel the necessity of obtaining Congressional support and in each case this is justified as a defensive measure. Soon the Board's decision appears to be made in an atmosphere of Congressional claims rather than on the basis of the arguments of counsel.

Third: In most cases, legislators have not studied the record in the case. Their arguments are not akin to the argument of counsel in a quasi-judicial proceeding, but more in the nature of testimony given at Congressional hearings. They do not contribute substantially to an understanding of the complex factual issues which the Board faced in a route case. They are more in the nature of a demand for a political action.

FOURTH: Even though pressure is not exerted, the appearance of Congressional advocates creates an appearance of pressure. While the Act contemplates that the Board shall make an independent decision on the record, the practical fact is that it is subjected to a great deal of perfectly proper supervision by Congress, not only in the exercise of the Congressional power to legislate, but in its power to investigate and appropriate. Since Congress, as a whole, has the power to supervise the Board, the appearance of Congressmen in formal Board arguments creates the impression that the Board is subject to the demands of individual Congressmen.

For these reasons it is the opinion of the Committee that formal Congressional appearances in pending cases before the Civil Aeronautics Board are interfering with the proper performance of the Board's duty to render decisions on the basis of the facts of record. It recommends:

1. That the Board's Rules of Practice be amended to prohibit these appearances; and

2. In order to provide an opportunity for the expression of Congressional views and to assure that these views shall be expressed publicly rather than privately, the Committee recommends that the Board docket contain a Congressional correspondence file in which all letters received by all Congressmen to any Board member, relating to any pending matters, be promptly filed.

FURTHER REPORT OF AVIATION COMMITTEE—POWERS OF THE PRESIDENT UNDER SECTION 801 OF THE CIVIL AERONAUTICS ACT

I. Summary of the Problem

Section 801 of the Civil Aeronautics Act of 1938, as amended, makes subject to the approval of the President actions of the Civil Aeronautics Board with respect to certificates authorizing overseas and foreign air transportation or air transportation between places in the same Territory or Possession.[1]

Under this provision of the Act, the President has, in effect, exercised plenary powers over, *inter alia,* the grant of certificates of public convenience and necessity authorizing overseas and foreign air transportation and air transportation between points within the same Territory or Possession of the United States.[2] This Section of the Act, as applied by the Executive and as interpreted by the Courts, has resulted in the assumption by the President of the judgment and decision making processes of the Civil

[1] "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President" (52 Stat. 1014, 49 U. S. C. 601).

[2] In a speech before the Administrative Law Section of the District of Columbia Bar Association, Mr. Gerald Morgan, Special Counsel to the President, listed the burden on the President imposed by Section 801 as one of the areas where the duties of the President might be decreased.

Aeronautics Board, in cases where exercised, and has constituted in effect substitution of the President for the Board [3] *and without right of judicial review.*

S. 1423, 85th Congress, 1st Session, would, *inter alia,* amend Section 801 of the Civil Aeronautics Act by restricting the President's power to overrule CAB certification actions to foreign air transportation cases involving national defense and foreign policy. A complete discussion of the rationale for the amendment and the desirability of limiting the Presidential powers under Section 801 to accord with the original legislative intent is contained in the Report of the Senate Committee on Interstate and Foreign Commerce, which reported the aforesaid bill to the Senate with recommendation that it pass.[4]

Section 1 of S. 1423 would amend Section 801 by striking out the first sentence of that Section and inserting in lieu thereof the following:

> "The issuance, denial, transfer, amendment, cancellation, suspension. or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in foreign air transportation, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President of the United States in any case which he determines may affect the national defense or foreign policy of the United States. The President shall report to the Congress any case in which he withholds such approval including in such report the action he has ordered the Board to take and his reasons therefor unless he finds such report would be contrary to the interests of national defense or foreign policy, which finding he shall communicate to the Congress."

The effect of the amendment would be to eliminate the Presidential powers over overseas air transportation and air transportation between places in the same Territory or Possession, and restrict the President's jurisdiction over foreign air transportation cases by requiring report to the Congress of the specific national defense or foreign policy considerations upon which Executive over-riding of Civil Aeronautics Board action is premised, unless such disclosure is contrary to defense and foreign policy interests.

Attached hereto is the pertinent portion of Senate Report No. 19, which at pages 1 through 5 sets forth the considerations which governed the Committee's favorable consideration of this Section of the bill.

II. Recommendations

(a) That the Administrative Law Section recommend to the Board of Governors that the Association express its support for the enactment into law of Section 1 of S. 1423.

[3] *Chicago and Southern Air Lines v. Waterman Steamship Corp.,* 333 U. S. 103. "Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorization that are subject to his approval, but denial, transfer, amendment, cancellation, or suspension, as well. And likewise subject to his approval are the terms, conditions, and limitations of the order (49 U. S. C. 601). Thus, Presidential control is not limited to a negative but is a positive and detailed control, unparalleled in the history of American administrative bodies."

[4] Senate Report No. 119, February 27, 1957, Calendar No. 119, 85th Congress, 1st Session.

(b) That the Administrative Law Section recommend to the Board of Governors that the Association recommend the further amendment to Section 801 of the Civil Aeronautics Act, so as to require in cases subject to the approval of the President under Section 801 that the Civil Aeronautics Board issue its decisions (recommendations) publicly at the time its decisions (recommendations) are forwarded to the President for approval.

(c) That the Administrative Law Section recommend to the Board of Governors that the Association recommend amendment to Section 1006 of the Civil Aeronautics Act so as to insure right of judicial review of orders of the Board denying basic procedural rights in advance of final determination of any cases subject to the approval of the President under Section 801.

III. Discussion

(a) *Recommendation No. 1*: The Senate Committee Report, No. 119, accompanying S. 1423, contains a well reasoned justification for the amendment of Section 801 so as to restrict the President's power to overrule Civil Aeronautics Board certification actions to foreign air transportation cases involving national defense or foreign policy. The section of the Senate Committee Report dealing with this phase of the legislation has substantially facilitated your committee's task in analyzing the problem and legislative solution.

Legislative history of the Civil Aeronautics Act fails to support a conclusion that it was intended that the Executive should be vested with broad powers over the disposition of any and all cases falling within the jurisdictional scope of Section 801. Actions taken by the President in the past, in over-ruling Civil Aeronautics Board decisions, and as the exercise of that power has been upheld and interpreted by the Courts, have gone far beyond the original intent of the Congress, and far beyond considerations of national defense and foreign relations policies.

Certification matters relating to overseas air transportation and air transportation between points in the same Territory or Possession have at best minimal foreign relations or national defense implication. While in some instances, particularly as within Alaska, there are substantial defense considerations, these matters have and can be communicated to the Board through normal procedural avenues.

Section 801 cases, as other cases before the Civil Aeronautics Board, are tried in accordance with the provisions of the Administrative Procedure Act and under all applicable rules governing judicial processes, with respect to evidentiary matters, due process and the normal body of ethical and professional standards pertaining to the judicial trial of issues. Massive technical and economic presentations are submitted subject to intensive cross examination, with a final record closely analyzed by the expert body. In Section 801 cases, however, with the disposition of the case by the Board, its "decision" becomes a "recommendation" to the Executive. Due process ends, and the right of judicial re-

view is eliminated. The matter is thereafter handled by the Budget Bureau on behalf of the President for coordination of Departmental reports and for independent analysis of both economic and other factors extrinsic in most cases to national defense and foreign policy considerations. The requirements of "due process" and the Administrative Procedure Act are thereafter ignored, and the decision by the President becomes a ministerial one, subject to all of the forces and inter-plays of *ex parte* presentations through whatever avenues private litigants are able to find in the Executive Departments and before the White House. The *letter,* as well as the spirit, of the mores of judicial procedures are, with apparent propriety, ignored. The President, rather than the Board, becomes the final arbiter of economic and technical considerations governing the public convenience and necessity.

In the carrying out of its responsibilities under the Act, the Board is required to consider the commerce, postal service *and national defense.* Section 801 was intended to retain in the President the right of approval or disapproval only with respect to matters of foreign policy and national defense peculiarly within the ken of the Executive. Independent decisions, at variance with the decisions (recommendations) of the Board, have been made by the President in such matters as all-expense tour certificates, and on the basis of considerations only remotely if at all related to overriding national defense and foreign policy concerns.

It must, therefore, be concluded, consistent with the Committee considerations, that the proposed legislative restriction on the powers of the President, particularly with the safeguards set forth therein, "would not result in any practical restriction of the Presidential powers"; that the proposed restriction would return to the Civil Aeronautics Board the functions with which it was intended to be entrusted by the Congress with respect to *all* air transportation, and with only such exceptions as are necessary to insure an application of Section 801 in harmony with the scheme of the regulation provided by the Act, the legitimate province of the President, and with greater assurance of due process to litigants before the Board.

(b) *Recommendation No. 2*: At the present time decisions subject to Section 801 are not released to the public until after Presidential approval. As recommendations they are, however, distributed widely to Executive Departments of the Government for consideration and report. While possibly intended and "required" to be maintained in confidential status, they do not possess even the technical trappings of the confidential treatment which should theoretically be accorded the judicial pronouncement of the Board, pending release. Nevertheless, although the public is precluded from knowing the Board's recommendations, such recommendations become an open secret to those interested litigants who possess entree to, via influence, whether personal, political or otherwise to seek audience with one or more of the Execu-

tive Departments. Private litigants, small carriers, without such means of entree, as a practical matter, are therefore placed at an incalculable disadvantage *vis a vis* their more powerful competitors. This is a practical situation, a situation which the Board recognized with respect to the difficulties of maintaining in confidential status the substance of its own decisions, not subject to Section 801, and which it remedied by a policy determination of releasing to the public the results of its votes as soon as reached. Equity and justice to the public, and *all* private litigants, small and large, require that there be released as soon as made the Board's recommendations to the President in those cases which are or will be continued to be subject to Presidential approval.

(c) *Recommendation No. 3*: At the present time, preliminary actions and interlocutory Board procedural orders, such as orders of consolidation involving *Ashbacker* conflicts, may not be reviewable by the Courts until a final order of the Board has been entered. In cases subject to Section 801, this may have the result of depriving private parties of the right to judicial review of prejudicial interlocutory orders, because the final decision, with the approval of the President, whether the Board's decision is changed or confirmed, may under *Waterman, supra*, p. 208, N. 3, *not* be subject to judicial review. Due regard for the rights of private litigants contesting important and valuable route franchises in Section 801 cases can only be preserved by insuring a right of review prior to final decision on Board orders which, under normal circumstances, would not be reviewable until after final decision in the case.

This recommendation is not directed to expansion of the right of review over procedural and interlocutory orders. It is intended to provide relief to litigants, legally prejudiced by an interlocutory order which would otherwise be subject to review following final decision, if injured thereby, but as to which the right of review is destroyed as the result of the legal effect of the Presidential action in Section 801 case.

Respectfully submitted,

AVIATION COMMITTEE,
WILLIAM C. BURT,
Chairman.

APPENDIX TO REPORT OF AVIATION COMMITTEE

Pertinent Extract from Senate Report No. 119, 85th Congress, 1st Session, pp. 1-5

II. PURPOSES OF THE BILL

Section 1

Section 1 of the bill amends section 801 of the Civil Aeronautics Act of 1938 by withdrawing from the President the power of review and approval of Civil Aeronautics Board certification actions in all cases involving overseas air transportation and air transportation between places in the same Territory or possession. In the field of foreign air transportation, it would specifically limit his power to overrule the Board to cases having relation to the national defense or the conduct of foreign relations.

In its present form, section 801 of the act requires Presidential approval of any action taken

by the Board with respect to certificates authorizing a domestic air carrier to engage in air transportation beyond the continental limits of the United States, or certificates allowing foreign air carriers to operate to points within the United States or its possessions. In adopting this section Congress recognized the potential significance of overseas air commerce development to the Nation's foreign relations and defense policies. To avoid any possible inconsistencies it was therefore deemed advisable to require Executive approval of all certification orders in overseas cases, whereas Board decisions affecting domestic air transportation are final, subject only to judicial review.

Although originally intended merely as a means for Executive review, granting powers to be used only in exceptional cases, section 801 has had the unforeseen but perhaps inevitable effect of transferring from the Board to the White House ultimate responsibility in every respect for the disposition of cases within its purview.

The broad extent to which the President's authority under this section has come to be construed is significantly set forth by the Supreme Court in its decision in the case of *Chicago and Southern Air Lines* v. *Waterman Steamship Corp.* (333 U. S. 103). The Court therein held that a Board order covered by section 801 is not a final disposition of the matter, but a mere "recommendation" to the President. Noting, in fact, that the Board altogether ceases to function as an arm of the Congress in such cases, and becomes virtually an organ of the executive branch, the Court states:

> Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well. And likewise subject to his approval are the terms, conditions, and limitations of the order (49 U. S. C. 601). Thus, Presidential control is not limited to a negative but is a positive and detailed control, unparalleled in the history of American administrative bodies.

The practical result of this total shifting of authority has been to subject the President directly to all the burdens and pressures of air commerce regulation. Thus, he is called upon in every section 801 case to pass final judgment on the fitness, willingness, and ability of air carriers to perform the service in question—these being the fundamental statutory criteria for the issuance of any certificate. In the great majority of instances, including those covered by section 801, the decision called for must be based entirely on economic or technical considerations having no practical bearing whatsoever on national defense policy or the conduct of foreign relations.

As an example, a case might arise involving a determination as to which of two equally competent air carriers shall be certified to fly a given route between the mainland and a Territory. After a full hearing of the issues and a finding by the Board the disappointed applicant may press his suit anew at the White House; and, under present law, he need not even frame his appeal in terms of a defense or foreign policy issue. Worst of all, Presidential decisions in all such cases have been held, in the above-cited opinion by the Supreme Court, to be beyond the judicial review guaranteed by section 1024 of the act.

The harm to sound administrative and judicial procedures which this situation has created is readily apparent. Matters of an economic or regulatory nature which the Board, acting under the aegis of the Congress, is alone competent to decide and for which it alone is adequately staffed and ordered have somehow unwittingly become delegated to the Executive.

The Board itself has stated in this regard that the proposed legislation is feasible in that it would relieve the President of the burden of examining and passing upon complex economic matters for which the Board is staffed and to which the Board devotes a major part of its activity.

Section 1 of the bill seeks to correct this by restricting the scope of Executive powers to those areas in which it is reasonably necessary for him to act, and second, by specifically predicating those powers on his national defense and foreign policy responsibilities. Thus stated, there should no longer be any question that the authority of the President under section 801 extends little further than the right of veto.

By limiting his authority to foreign air transportation the bill withdraws from the President the right of review of cases involving transportation between the continental United States and a Territory or possession, or between Territories

and possessions, or between places in the same Territory or possession. Under the bill, Board decisions respecting such air transportation would be final, as in the case of domestic air transport. There are virtually no foreign policy considerations in this field, only American carriers are concerned, and it is believed that whatever national defense interests might be involved are no greater than those which would often apply to domestic air transportation—particularly to the large trunklines. In any event, your committee notes that executive agencies, including the Department of Defense, may appear before the Board during its hearings on certification cases. Should a case bearing on the national defense arise, the President can certainly rely upon the members of the Board, his own appointees to give the greatest possible weight to the testimony of responsible executive officials in that field.

The bill recognizes that the Presidnt's responsibilities do require that he continue to give careful scrutiny to certain cases involving foreign air transportation. His power to review such cases for possible defense as well as foreign-policy implications is thus carefully preserved. He would, however, be required to submit to Congress a report of any instance in which he overrules a Board order as contrary to the interests of defense or foreign policy.

However, this section would allow the President to exclude from such report the specific reasons for his disapproval of a Board certification action if, in his discretion, the inclusion of such specific reasons would be contrary to the interests of national defense or foreign policy, which finding he would communicate to Congress in lieu of the specific reason for disapproval. If required in every case to make a public report of the considerations prompting his decision, the President might well on occasion be put in a position of having to divulge information to the prejudice of the very interests which his action sought to protect. On the other hand, your committee did not believe that the making of a report should be left completely within the President's discretion. In this form, section 1 of the bill thus requires the President either to render the described report or a finding that such report would be contrary to national defense or foreign policy interests.

Representatives of the Departments of State and Commerce, commenting on S. 3914, a similar bill in the 84th Congress, agreed that it would not result in any practical restriction of Presidential powers. They were nonetheless opposed to it, for the asserted reason that the more precise definition of those powers would not result in the hoped-for rationalization of procedures or a lessening of Executive burdens. This contention was based on the assumption that any certification case dealing with foreign air transportation will, ipso facto, have some bearing on the Nation's foreign policy and therefore require Presidential review.

In discussing S. 3914 of the 84th Congress this committee said:

> Aside from the fact that this is no valid reason for objecting to the bill as drawn, your committee agrees that such an assumption may be theoretically sound. By the same token, no facet of the Nation's foreign commerce can be said to be completely isolated from any effect upon official relations abroad. The extent to which any action or decision in this field need fall under direct Executive control remains always a relative and selective matter. Important considerations of foreign policy do indeed apply in the realm of international air transport; e.g., the exchange of routes, types of service, the problem of capacity, etc. But these as well as any other questions which might foreseeably bear upon national air transport policy are matters normally subject to antecedent diplomatic negotiation and agreement with the foreign government concerned. The complex pattern of bilateral and multilateral air agreements which has come into existence since the close of World War II was hardly foreseen at the adoption of the act. Today these agreements form the framework of the Nation's foreign air policy.

In accordance with section 1102 of the act, the Board can take no action contrary to the provisions of any such agreement. Indeed it is difficult to imagine how a Board certification order involving transportation to any of the many countries with which an air bilateral agreement is in effect would be contrary to the interests of foreign policy without also being in violation of section

1102. For this reason, if no other, your committee is convinced that the bulk of cases concerning certification of individual carriers, both foreign and domestic, to engage in international air transport are and will continue to be decided solely on the statutory grounds of fitness, willingness, and ability yto perform in accordance with the provisions of the act, decisions with which the President need not concern himself at all. That being so, section 1 of the bill cannot help but have the desired result of relieving the President of much unnecessary burden and restoring entirely to the Board the regulatory functions for which it was created.

Under the Civil Aeronautics Act, the Civil Aeronautics Board is the agency of government vested with the responsibility to develop an air transportation system properly adapted to the present and future need of the foreign commerce of the United States. Section 1 restricts to the Board its responsibilities as intended by the Congress under the Civil Aeronautics Act of 1938, as amended, and secures to the Board its function as the principal aviation advisor to the President on international air agreements. It also prevents the executive department from changing the Board's recommendations and then only insofar as the power of veto is concerned when in the interests of national defense or foreign policy.

REPORT OF THE COMMUNICATIONS COMMITTEE

During the last year the Federal Communications Commission has been engaged in a study of its procedural rules with a view towards an overall amendment and revision of these rules. The main activity of the Committee during the last year has concerned itself with participation in the rule making proceedings, looking toward the revision of the rules.

On October 18, 1956 the Federal Communications Commission, in Docket No. 11846, issued a Notice of Rule Making, outlining a revision of its proposed procedural rules and requesting comments thereon from interested persons. The Communications Committee, after its organization, immediately began consideration of the Notice of Rule Making. It soon became apparent that the Commission had not afforded adequate time for consideration of these rules and for this reason the Communications Committee requested that the time for filing comments be extended. The Commission granted this request.

Because the proposed rules affected all phases of communications activity, the Committee organized itself into three subcommittees, each of which was to have responsibility for the review of rules affecting specific spheres of activity: Broadcasting, Safety and Special Services, and Common Carrier. In an effort to secure members qualified to deal with each of these spheres of activity, in organizing, the Committee invited and secured acceptance from highly qualified members of the Bar practicing in each of these spheres. In addition, members of the staff of the Federal Communications Commission, specializing in each of these fields, were invited and joined the Committee.

The sub-committees undertook a careful review of the Commission's Rules and were prepared to file formal comments in the rule making proceeding when the Commission announced that it would hold an open seminar for a discussion of the proposed rules. This seminar was conducted with members of the Federal Communications Bar Association. However, nearly

all the members of the Communications Committee are also members of that Bar Association and several members of the Committee were members of the special committee of that Bar Association studying the same rules.

A seminar was subsequently held on November 30, 1956. As a result of this seminar, the Federal Communications Commission withdrew its outstanding Notice of Proposed Rule Making and started a series of informal conferences with interested persons in an effort to consider their comments on an informal basis. A representative of the Communications Committee consulted with members of the Commission staff, and on an informal basis, supplied the Commission staff with the views which the Committee had proposed to submit formally.

No further public action has been taken by the Federal Communications Commission with respect to its rules. It is contemplated that eventually a new Notice of Rule Making will be issued and the public once again invited to submit comments. At that time the Communications Committee will no doubt continue its efforts in connection with these rules.

The Communications Committee also from time to time discussed a possible amendment of the Communications Act with respect to the requirement of separation of functions between the Commission and members of the staff and examiners. No final recommendations were adopted by the Committee, however, in view of the fact that the Federal Communications Commission has never formally proposed any new legislation on this subject to Congress.

For the Committee,

By Paul Dobin
Chairman

REPORT OF COMMITTEE ON GAS AND GAS AND ELECTRIC POWER

During the current year, which was an abbreviated one, the Committee on Gas and Electric Power had one meeting in Washington, D. C. At this meeting, chief attention was given to Bills now in Congress (H. R. 3350 and S. 932) which would create an Office of Administrative Practice headed by a Director of Administrative Practice.

It was the general view of those attending the meeting that the proposed legislation, while sound in ultimate purpose, went too far in drastically changing administrative procedures as they relate to the regulation of public utilities. It was agreed that further study would be given to the Bills with the plan of reporting rather fully the Committee's views, but unfortunately, because of business pressures on individual members, it was not possible to hold a second meeting.

It is our hope that in the forthcoming year additional study will be made of the Bills referred to above as well as other proposals in the administrative law field, currently under discussion, which would have a most significant impact upon methods, procedures and actions of all

agencies charged with the regulation of gas and electric public utilities. Accordingly, by the necessities of the case, this report must be in the nature of a report of progress only.

Respectfully submitted,

CHARLES W. SMITH
Chairman

REPORT OF COMMITTEE ON IMMIGRATION AND NATIONALITY

The Committee on Immigration and Nationality began the current year with a large item of unfinished business on its hands, and since, as of the date this report is submitted, it remains unfinished, we review it briefly before passing on to other matters.

Two years ago the Association adopted four resolutions advanced by this Committee and approved by the Section. The first of these provides for the establishment of a Board of Visa Appeals. The second, having in view the fact that in security cases aliens may be excluded from the United States without hearing, provides that no alien shall be excluded except upon record evidence taken at a hearing, provision being made in such cases for protecting confidential information and the sources thereof. The third reiterates the Association's previously-taken position that immigration hearing officers should be appointed under Section 11 of the A.P.A. and that hearings should be governed by Sections 5, 7, and 8. And the fourth makes provision for judicial determination of United States nationality whether the claimant is within or without the United States and, if without, for enabling him to enter the country to appear in person where the Court finds that the action is instituted in good faith and has a substantial basis.

In furtherance of this rather substantial program, representatives of the Association were scheduled to appear before the Senate Subcommittee at general hearings to be held in November 1955. On the day before the Association's representatives were to testify, the hearings were terminated. No more hearings were held during the 84th Congress. With the opening of the 85th Congress, our request to be heard was repeated, but to this time no hearings have been announced.

With many new immigration bills introduced, and in the light of experience clearly indicating a need for change, there is abundant reason for holding extended general hearings during the present session of Congress, but it cannot with confidence be predicted that this will be done. Nor can it be predicted that, if held, they will go beyond the exigencies of the Hungarian refugee program.

In any event the four adopted resolutions will continue to comprise an important backlog of our legislative program, to be given priority when opportunity for advocacy finally comes.

Looking forward, your committee has settled upon two further areas of the law with reference to which it is believed the

Section and the Association should be asked to take positions.[1]

The first of these is the question of judicial review, which has undergone significant evolution during the past few years. The view was long held that both deportation and exclusion orders were reviewable only in habeas corpus proceedings, and this view was sustained in *Heikkela* v. *Barber,* 345 U. S. 229, a case involving a deportation order that became final before the effective date of the Immigration and Nationality Act, the Court holding that the Administrative Procedure Act afforded no additional remedy. Since habeas corpus proceedings are available only to persons in custody, the result was that an alien ordered deported or excluded could not procure a judicial review of the order unless and until he was taken into custody.

Cognizance of this unsatisfactory situation was taken in 1954 by the Department of Justice, which caused a bill to be introduced providing a specific judicial review for deportation orders (though not for exclusion orders). This represented an advance over then-existing law and upon the recommendation of this committee, approved by the Section, the Association endorsed the proposal in principle.[2]

A year later, however, the question was again before the Supreme Court in *Pedreiro* v. *Shaughnessy,* 349 U. S. 48. This case arose under the Immigration and Nationality Act, and under this legislation the Court found the right to review of a deportation order by declaratory judgment proceedings under Section 10 of the A.P.R. had been preserved.

If the *Pedreiro* case left any doubt as to whether legislation was still necessary, *Brownell* v. *Tom We Shung,* 352 U. S. 180, removed it. This case presented the question of whether an exclusion order may be tested by declaratory judgment proceedings under Section 10 of the A.P.A. The Government urged that only habeas corpus was available, pointing out that the constitutional position of an alien seeking initial admission into the United States is different from that of an alien within the country against whom deportation proceedings are instituted. The Government urged also that the finality clause of the Act with reference to exclusion[3] ("the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General") limits review to administrative appeal to the Attorney General and no other form of review than habeas corpus was intended. A unanimous Court ruled adversely to these contentions, saying: (1) The constitutional status of the alien requires no different treatment, since it is only the form of judicial review, and not its scope, that is involved; and (2) to limit review to habeas corpus would run counter to Sections 10 and 12 of the A.P.A., and no abridgment of judicial review being found in the Act, it must be concluded that the finality clause refers only to administrative finality.

[1] Two members of the committee, Miss Collins, of the Office of the Assistant Attorney General, Legal Counsel, and Miss Wilson, a member of the Board of Immigration Appeals, did not participate in these portions of the committee's deliberations.

[2] This action was by resolution adopted March 9, 1954.

[3] Section 236(c), 8 U. S. C. 1226(c).

The original Department of Justice proposal for legislation and other such proposals have been carried forward into bills introduced in the 85th Congress. Section 34 of S. 1006 (Watkins) and H.R. 4205 (Keating), identical bills introduced to effectuate the Administration immigration program, provides for judicial review of deportation orders, provided the action is brought not "later than six months from the date of the deportation order", but expressly limits judicial review of exclusion orders to habeas corpus "notwithstanding the provisions of the Administrative Procedure Act or any other law." Section 110 of H.R. 3364 (Celler), an omnibus bill, would provide judicial review for both deportation and exclusion orders, as also would Section 207 of S. 836 (Ives and others).

We shall not discuss the relative merits of these provisions since, as pointed out above, it is felt that decisions of the Supreme Court have now made legislation relative to deportation and exclusion orders unnecessary. At the same time, your committee would not wish to foreclose the possibility of any improvement in judicial review in general that might be effected in connection with the proposed revision of the A.P.A. Your committee presents the following resolution:

> "Resolved that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:
>
> 'Whereas recent decisions of the Supreme Court of the United States have clarified questions of judicial review under the immigration and nationality laws of the United States, and have construed Section 10 of the Administrative Procedure Act as applicable to deportation and exclusion orders under said laws,
>
> 'Be It Resolved that the American Bar Association regards as presently unnecessary any legislation concerned with judicial review under the immigration and nationality laws, that it favors the continued application of Section 10 of the Administrative Procedure Act to proceedings arising under said laws, leaving the question of further improvements in judicial review to a comprehensive study by Congress of a proposed revision of the Administrative Procedure Act, and authorizes the Section of Administrative Law to appear before the committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.' "

This matter has been coordinated with the chairman of the Section Committee on Judicial Review, which committee, we are advised, is presenting an identical resolution.

The second area of the law with reference to which your committee believes the Section and the Association should be asked to take a position is that concerning the status of the Board of Immigration Appeals. Although this important body makes appellate decisions that vitally affect the entire lives of the individuals concerned, it is wholly a creature of regulation and could be abolished any day by regulation.

The Board is not even mentioned in the Immigration and Nationality Act. And indeed the Act really doesn't say too much upon the subject of administrative appeals in general. With reference to deportation, for example, after providing that special inquiry officers shall conduct proceedings to determine deportability, the Act says only that "In any case in which an alien is ordered deported from the United States, * * * The decision of the Attorney General shall be final." [4]

From such a beginning, regulations take over. They provide that "There shall be in the office of the Attorney General a Board of Immigration Appeals. It shall be under the supervision and direction of the Attorney General and shall be responsible solely to him." They state from what decisions of special inquiry officers, of district directors, of assistant commissioners, of regional commissioners, and of other Immigration Service officials, appeals shall lie to the Board. They provide how the Board's jurisdiction shall be exercised. They provide, that the Board's decisions shall be final unless reviewed by the Attorney General, which review may be had at the direction of the Attorney General or at the request of the Immigration Service or of the chairman, or a majority of the members, of the Board (but not of the alien).[5]

It has seemed to your committee that this is too large an order to be left to regulation. We believe, first, that the Board's continued existence ought to be assured by giving it statutory status. We believe, second, that its jurisdiction ought to be made certain by statutory formulation and that such jurisdiction, which has been subject to some change, ought certainly to be no less inclusive than it now is.

S. 1006 (Watkins), H.R. 4205 (Keating), and S. 836 (Ives and others) contain no provision for an immigration appeals board. Section 107 of H.R. 3364 (Celler) provides for a board authorized to entertain both immigration and visa appeals, but this is predicated upon another section of the bill (Section 506) that transfers to such board and to a new "Bureau of Immigration and Citizenship" within the Department of Justice, all functions and all employees of the Department of State having to do with immigration, nationality, and citizenship laws.

Your committee takes no position with reference to such a board since, under Mr. Celler's proposal, it would appear to be feasible only if such a transfer of State Department functions to the Justice Department were made, and since this latter involves questions of government reorganization with which your committee is wholly unauthorized to deal. This consolidation of functions into one executive department is an eventuality that may never occur, and, as this committee said two years ago with reference to the creation of a Board of Visa Appeals within the State Department,[6] we now say with reference to the establishment of a statutory Board of Immigration Appeals, that it should not be

[4] Section 242(b), 8 U. S. C. 1252(b).

[5] 8 C. F. R. Part 6.

[6] Administrative Law Bulletin, Vol. 7, No. 4, p. 236.

made to await that eventuality. Your committee presents the following resolution:

"Resolved that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'Whereas the Board of Immigration Appeals of the Department of Justice is established by regulation only, with no statutory assurance of either its existence or jurisdiction,

'Be It Resolved that it is the opinion of the American Bar Association that the Board of Immigration Appeals of the Department of Justice be granted statutory status and authority, with no less than its present jurisdiction, and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.' "

This report is perhaps the place to record an item of information that may otherwise not come to the attention of the full membership of the Section. The President of the Association, saying that the field of immigration and nationality "is a matter of increasing interest to our members," has asked the Association's Committee on Scope and Correlation of Work to consider whether a special committee of the Association on immigration and nationality should be established.

The advice of your committee being requested by the Chairman of the Section, it was pointed out that because of the limited scope of your committee, the substantive law of immigration and nationality is without representation in the Association, and the view was expressed that this field of law has currently achieved such a new high point of general interest and importance as to leave no doubt that the special committee should be established. The Council of the Section being of the same opinion, it is understood that the matter is now back in the hands of the Committee on Scope and Correlation of Work.

Respectfully submitted,

COMMITTEE ON IMMIGRATION & NATIONALITY

BENJAMIN G. HABBERTON
Chairman

LOUIS L. JAFFE
JACK WASSERMAN
Vice-Chairmen

REPORT OF COMMITTEE ON INDIAN MATTERS

The Committee on Indian Matters selected three major projects for its objectives this year:

1. A study of existing legislation dealing with the relationship between the United States and attorneys representing individual Indians and Indian tribes. In particular, consideration will be given to the revision of 25 U. S. C., secs. 81-84.

This study has been completed. It points up the need for amendment of existing law to eliminate archaic requirements for execution of contracts with Indian tribes before judges of courts of

record and for detailed accounts of services rendered in support of the charges under the contract.

Proposed legislation has been drafted for submission through the prescribed channels to obtain Association endorsement.

2. Cooperative effort with the Department of the Interior in its current work on the "Handbook of Federal Indian Law" now going forward at the direction of Congress.

The "Handbook of Federal Indian Law" originally was prepared under the auspices of the former Associate Solicitor of the Department of the Interior, the late Felix S. Cohen, who was regarded as a recognized authority on Indian law. The "Handbook" is the most comprehensive publication in the field.

The "Handbook" is being revised under the direction of the Solicitor of the Department of the Interior at the request of the 84th Congress. The Committee offered its assistance to the Solicitor in aid of presenting an objective statement of the law. The Solicitor's office explained that there was to be no comprehensive rewrite and that a reviser from the Library of Congress had been employed to "update, revise and edit", to reflect new decisions and statutes and to modify the index.

The Solicitor was not able to permit the Committee to review the revised work but we are hopeful that such an opportunity will be made available by the Senate and House Committees on Interior and Insular Affairs before the revision goes to press.

3. A program to complete and bring down to date Kappler's *Indian Affairs, Laws and Treaties.*

Kappler's *Indian Affairs, Laws and Treaties,* is the basic compilation of legislation in the field of Indian law. It is contained in five volumes published under the direction of the then Senate Committee on Indian Affairs and covers the period up to June 29, 1938.

The Committee volunteered the lawyer work necessary to prepare a supplement to Kappler covering the post-1938 period and all pre-1938 acts and treaties omitted from the published work. The Senate and House Committees on Interior and Insular Affairs were requested to make funds available for stenographic and reproduction costs and for a professional indexer and to authorize printing by the Government Printing Office. Funds were not available in the current session of Congress but we are hopeful they will be available in the next session.

During the course of the year, two more items were added to the Committee's program:

4. Preliminary study of the positions of Indian probate examiners as related to administrative practice.

Probate examiners for Indian estates are excepted from the Administrative Procedure Act. The study of this problem was commenced during the year and is recommended as an item on the Committee's program for 1957-1958.

5. Study of the practice of the Department of the Interior with respect to service of process or its equivalent on individual Indians and Indian tribes in protests, contests and appeals arising out of decisions of the Bureau of Indian Affairs.

Frequently, non-Indians seek relief from regulations or are aggrieved by decisions of the Department arising out of transactions relating to Indian property. The property right at stake belongs either to the Indian or to the non-Indian. For example, where a bidder on a tribal oil and gas lease seeks return of his deposit after the bid is accepted, the money involved belongs either to the bidder or the tribe. The practice of the Department has been to decide the matter on the representation of the aggrieved party without notice to the Indian or tribe affected. This situation informally has been called to the attention of the Solicitor's office, and there is every evidence that it will be corrected. However, we recommend that it be placed on the Committee's program for next year.

COMMITTEE ON INDIAN MATTERS

MARVIN J. SONOSKY
Chairman

CHARLES H. WOODS
Vice Chairman

CHARLES J. ALEXANDER
RALPH A. BARNEY
H. E. HYDEN
CEDOR B. ARONOW
JOHN C. FARRAR
ARTHUR LAZARUS, JR.

REPORT OF LABOR COMMITTEE

Based on the report attached hereto, the following resolution is submitted for favorable consideration by the Administrative Law Section of the American Bar Association and by the House of Delegates thereof:

"RESOLVED, That the American Bar Association endorses and urges enactment of S. 1723, 85th Cong., 1st Sess., which would permit state courts and agencies to assert jurisdiction over labor disputes affecting interstate commerce if the National Labor Relations Board would decline to assert jurisdiction over such disputes on the ground that the effect on commerce is insubstantial, and

"FURTHER RESOLVED, That the Administrative Law Section is hereby authorized to present such endorsement of the American Bar Association on S. 1723 to the appropriate Congressional committees through testimony at hearings or otherwise, and to take all other steps that are appropriate in an effort to secure enactment of said bill."

The United States Supreme Court, in three decisions render on March 25, 1957, decided that in any labor dispute affecting interstate commerce, neither a state court nor state agency has jurisdiction, notwithstanding the National Labor Relations Board declines to assert jurisdiction in the case on the ground that it would not effectuate the policies of the National Labor Relations Act for it to do so. *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1; *Amalgamated Meat Cutters* v. *Fairlawn Meats,*

353 U. S. 20; *San Diego Building Trades Council* v. *Garmon*, 353 U. S. 26. The Court held that Sec. 10(a) of the National Labor Relations Act [1] provides the only means whereby the National Board may cede jurisdiction to a state over labor disputes falling within the purview of the National Act.[2] The Court so held despite the fact that the limitations of Sec. 10(a) are such that the Board has been unable pursuant thereto to cede jurisdiction to any state.

The result of the Court's decision is to create a no man's land for many labor disputes. The National Board declines jurisdiction because the impact upon commerce is insubstantial and yet neither a state court or agency can act. Many employers, employees, and unions are thus deprived of any forum in which to seek relief even though their rights are being violated. Accordingly, Senator Watkins of Utah has introduced a bill to correct this situation (S. 1723, 85th Cong., 1st Sess.). That bill provides as follows:

"Section 6 of such [National Labor Relations] Act is amended by redesignating it as section 6(a) and by adding at the end thereof a new subsection as follows:

'(b)(1) The Board, in its discretion, may decline to assert jurisdiction over any labor disputes where, in the opinion of the Board, the effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

"(2) Nothing in this Act shall be deemed to prevent or bar any agency, or the courts of any state or territory, from assuming and exercising jurisdiction over labor disputes or classes of labor disputes over which the Board would decline, pursuant to paragraph (1) of this subsection, to assert jurisdiction.'" [3]

Except for the dissenters, whose dissent is noted below, the Labor Committee, Administrative Law Section, American Bar Association, heartily endorses the Watkins bill, S. 1723.

First, the Committee believes that if a person is aggrieved by illegal conduct of another, he should be entitled to appeal to some forum—state or federal—to obtain relief. If the National Labor Relations

[1] 61 Stat. 146, 29 U. S. C. Sec. 160(a).

[2] Sec. 10(a) of the National Act provides as follows:
"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

[3] Senator Watkins has also introduced another bill (S. 1933, 85th Cong., 1st Sess.) which would eliminate the no man's land in all areas—not only that of labor disputes. S. 1933, which has been assigned to another Committee of this Section, would add a new Section 13 to the Administrative Procedure Act as follows:

"Section 13. In any case in which an agency which is authorized to exercise jurisdiction over any matter involving the regulation of commerce, or to decline to exercise such jurisdiction, declines to exercise such jurisdiction on the ground that the effect on commerce is not sufficiently substantial to warrant the exercise of such jurisdiction, nothing in any Act of Congress shall be deemed to prevent or bar any agency or court of any state or territory from assuming and exercising jurisdiction under the laws of such state or territory over the matter or class of matters with respect to which jurisdiction is so declined." See *infra*, p. 249.

Board's door is closed to him, he must be able to appeal to a state agency or court. Otherwise, although he is an innocent party, he is compelled to suffer the unlawful conduct without redress.

Second, there is no possibility of conflict between state and federal authority, where the federal authority lies dormant and unexercised and the federal Board has announced that it will not proceed in a given area.

Third, unless the Watkins bill is enacted the inevitable result will be to compel the National Board to take jurisdiction in all cases falling within the ambit of the National Act. Otherwise, innocent parties who are victims of unlawful acts will have no remedy. But that will create an impossible situation. The Board with its limited budget and personnel is necessarily restricted. If it finds itself bogged down with many cases where the impact upon commerce is small, that will hinder it from carrying out the policies of the Act in much more important cases where really serious threats to interstate commerce are presented and frustrate the proper administration of the National Act.

Fourth, the matter of labor relations is one over which the several states have traditionally exercised control. The enactment of S. 1723 would be in the nature of a Congressional affirmation of that fact—an affirmation which the Committee believes should be welcomed as a step in the right direction today when more and more subjects are being regulated by the federal government to the exclusion of the states.

One member of the Committee expressed concern lest the Watkins bill be interpreted as permitting the National Board to decline jurisdiction over labor unions, when acting as employers, contrary to the decision of the Supreme Court in *Office Employees International Union* v. *NLRB,* 353 U. S. —. The Committee as a whole doubts that the Watkins bill could be so construed, inasmuch as it does not purport to control whether or when the National Board shall or shall not be required to take jurisdiction in a given case; it merely sets forth the consequences of the Board's inaction in given cases.

The same member suggested the elimination of the words "in its discretion" in proposed Section 6(b)(1) as set forth in the bill on the ground that such words might be in conflict with the later words "in the opinion of the Board" also appearing in the proposed Section 6(b)(1). He also suggested that the proposed Section 6(b)(2) should be amended to state unequivocally that a state or territory may act in any labor dispute where the National Board would decline to assert jurisdiction. The Committee as a whole does not believe that the sense of the bill would be changed by either of these suggestions and hence does not subscribe to them.

Another committee member suggested that the bill be amended to provide that a state may also act where the National Board declines jurisdiction on the ground that the subject matter inolved is neither prohibited nor protected by the National Act. The Committee does not regard such amendment as necessary because the Su-

preme Court has already made it clear that a state is free to assert jurisdiction, if the subject matter is neither prohibited nor protected by the National Act. *Int. Union* v. *Wisconsin Employment Relations Board,* 336 U. S. 245; *Weber* v. *Anheuser Busch,* 348 U. S. 468, 477.

Another Committee member suggested that the proposed Section 6(b)(1) be amended to require that the National Board's declination of jurisdiction must be effected by published rules. The Committee as a whole does not feel that the relief granted by the bill should be so conditioned. Rather, it believes that however the Board's declination of jurisdiction is accomplished, in that situation a state should be free to take jurisdiction.

Two Committee members are opposed to the Watkins bill and hence dissent from this report. They are of the view that the National Board should exercise jurisdiction over all establishments whose business affects commerce and should cede jurisdiction, as permitted under Sec. 10(a) of the Act, over businesses having a minimal effect upon commerce to state agencies if such agencies apply rules substantially identical to those applied by the National Board.

Respectfully submitted,

MILTON C. DENBO, *Chairman*
LABOR COMMITTEE

Separate Report of Plato Papps

I must respectfully dissent from the recommendation of the majority of the Labor Law Committee of the Administrative Law Section of the American Bar Association that the Association go on record in support of S. 1723.

The National Labor Relations Act provides a comprehensive code for the regulation of labor-management relations of employers and employees engaged in interstate commerce. It both prohibits and protects certain acts and conduct on the part of such employers and employees. The purpose of the Congress when it passed that Act was to achieve uniformity of treatment of employers and employees engaged in interestate commerce in the areas regulated by the Act.

The Watkins bill would destroy that uniformity. Most of the States do not have an agency established in the field, and the understandable unfamiliarity of the state courts due to their limited experience in the field has led those courts which have undertaken the task of deciding disputes in this field to conflicting results, irreconcilable with the principles and policies set out in the federal Act.

The majority would have one believe that a disastrous situation would result from a failure of passage of the Watkins bill—that an alleged "no-mans-land" has been created in which employers and employees engaged in interstate commerce cannot avail themselves of the proscrip-

tions and protections of the federal Act, or those provided under state statutes, or the common law remedies provided by the courts of those states which have no regulatory statute (the majority).

However, it is apparent the majority's real concern is not the preservation for employers and employees engaged in interstate commerce of the protections and prohibitions of the federal Act, but rather the loss of resort to the many state courts that have consistently refused to provide the safeguards set out in the federal Act.

Otherwise, why does the majority speak disparagingly of the probability the federal Board in the light of the *Guss* and related decisions may fulfill its statutory obligations by expending its jurisdiction to extend the uniform protections afforded by the federal Act to those employers and employees it has so cavalierly excluded from coverage by contraction of its jurisdictional standards? And if the Board is really troubled by budgetary problems, as it alleges (and which a number of its members deny), why doesn't the majority seek ABA support for a request addressed to Congress to grant a larger appropriation?

Or, if the cession provisions of Section 10(a) of the Act are too restrictive (as the Board and apparently the majority claim), why wouldn't better policy be one of loosening the cession provisions of the federal Act (Section 10(a)) to permit the Board to cede limited jurisdiction to those state agencies willing to safeguard in principle, if not in rigid terms, the precepts set out in the Federal Act (which in my opinion the Board could do now under 10(a), but hasn't tried).

The Watkins bill, by sanctioning the Board's current policy of expansion or contraction of its jurisdiction at will, depending on the whim or composition of the Board at any particular time, would leave the practitioner representing clients engaged in interstate commerce in doubt from day to day as to whether his conduct was protected or unprotected, proscribed or permissible, governed by federal law or state law—an intolerable situation!

In conclusion, then, it would appear better policy to seek to preserve uniformity in the regulation of the conduct of labor-management relations of employers and employees engaged in interstate commerce by leaving the Act as it is. Perhaps then the Board will rise to its responsibilities by exercising its maximum jurisdiction.

The better course would therefore seem to be either refrain from any statement of position on the part of the Administrative Law Section or the House of Delegates of the ABA or, if a position is to be expressed, it should be one of urging the NLRB to extend its jurisdiction to its utmost limits and to enter into cession agreements with State agencies whose statutes and administration thereof conform in general with the federal Act and its administration.

PLATO PAPPS, Vice-Chairman

COMMITTEE ON NATURAL RESOURCES AND INTERIOR AFFAIRS

Summary of Developments

Committee activity this year has centered in three agencies: the Bureau of Land Management and the Bureau of Mines, both in the Department of the Interior, and the Forest Service, in the Department of Agriculture.

The Bureau of Land Management closed over 121,000 cases in an eleven month period. Appellate procedures were involved in more than 2,000 of these cases although relatively few of these called for the use of the hearing examiners brought in during the year as a result of the decision of the Secretary of the Interior in *United States* v. *O'Leary*. Your particular attention is invited to that case (discussed *infra*) because it marks voluntary adherence by the Department to the hearing requirements of the APA in a particular type of case and necessitated a change in the Department's regulations. Secretary Seaton's recognition of court precedents without forcing a court test in the *O'Leary* case is to be applauded.

The Bureau of Mines adopted regulations during the year which have served to quiet some former problem areas in the definition of terms. Inquiry as to the possibility of regulations in other areas such as inspections is being withheld in view of current litigation.

The Committee inquiry relating to Forest Service procedure is new. Areas which require improvement were noted but it must also be stated that the Department of Agriculture and the Forest Service are currently seeking to make changes which will meet a number of the discrepancies found.

The Committee has made a number of suggestions in connection with the several drafts of the new Code of Federal Administrative Procedure. Further development on the proposed Code should be watched so as to preserve gains noted among agencies in which inquiries have been made by the Committee.

The Committee desires to express its appreciation to all of the officials of the several agencies visited for their splendid cooperation. It should also be recognized that the laboring oar was pulled by Committee members William Coburn and William Sanders on the Forest Service section and John Pickens on the Bureau of Mines section.

Bureau of Land Management—Department of the Interior

The Department is continuing to follow a voluntary practice of publishing in the Federal Register as proposed rule making changes proposed in some regulations affecting the administration by the Bureau of Land Management of a number of statutes on the public domain. Although it is understood that this practice is not considered mandatory by the Department it

can be stated that in general each contemplated change which in the Department's opinion treats with an item of general public interest, is published as proposed rule making prior to changes becoming effective. This is in accord with a resolution adopted by the Section upon a recommendation of this committee two years ago, and the continuing cooperation of the Department and the Bureau in this regard is highly gratifying. Examples of adherence to proposed rule making in the past year concerned changes in regulations relating to the leasing of coal lands in Alaska; amendments to regulations governing right-of-way easements over the public domain; and new regulations to implement the Act of Aug. 11, 1955 (69 Stat. 681) relating to the location of mineral claims on lands within power site withdrawals.

In the adjudications field the primary concern of the committee has been in the implementation of the new rules of practice which became effective on May 1, 1956. These rules govern appeals to the Director of the Bureau and thence to the Secretary of the Interior, on actions taken in the field, as well as procedures in cases in which a hearing may be in order.

At the committee's request Mr. Edward Woozley, Director of the Bureau, provided the following tabulation:

BUREAU OF LAND MANAGEMENT

NUMBER OF CASES CLOSED WITH RESULTING APPEALS FILED WITH THE DIRECTOR

May 1956 through March 1957

Type of Case	*Number of Cases Closed*[1]	*Number of Appeals*
Total Minerals Cases.	78,383	581
Lands Cases:		
Homesteads	2,109	78
Desert Land Entries..	2,662	835
Public Sales	2,350	94
Small Tracts	28,597	436
Exchanges	454	20
Selections	433	13
Other	6,722	66
Total Lands Cases.	43,327	1,542
Minerals Cases:		
Oil and Gas	74,413	444
Mineral and Mining..	3,909	137[2]
Other	61	—
Total Minerals Cases	78,383	581
TOTAL ALL CASES.	121,710	2,123

[1] This column includes all cases closed by Bureau administrative action, either favorable or unfavorable to applicant, and all cases involving leases, entries, etc., which terminated by operation of law or which were relinquished, cancelled, or withdrawn.

[2] Includes 9 appeals from decisions of hearings officers in mineral contest cases.

Particular attention is invited to footnote (1) relating to the number of cases closed. The closures are totals regardless of the action which may have been taken, whether it may have been an administrative closing or action favorable or unfavorable to an applicant or other party involved.

"Mineral and Mining cases" (Footnote (2)) include mining claims about which par-

ticular comment is in order by reason of the decision of the Secretary of the Interior on September 28, 1956, in *United States* v. *Keith* v. *O'Leary, et al.,* 63 I. D. 341. In this case the Government in 1952 initiated a contest of O'Leary's mining claim. This was done under Departmental regulations then in effect calling for a hearing in such cases to be held before the Manager of the local Land Office. O'Leary protested that the hearing should be held in accordance with the Administrative Procedure Act and thus before a hearing examiner independent of the Department. He was overruled on this but preserved the point through adverse ruling on the merits of his mining claim by the local Land Office and the Bureau of Land Management, up to the Secretary. The Secretary ruled that a mining claim is property which may not be declared invalid without proper notice and adequate hearing held in accordance with due process of law, even in the absence of a statutory requirement that a hearing be held to determine the validity of the claim. In addition, the Secretary examined several court precedents (*Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950); *Riss & Co., Inc.* v. *U. S.,* 341 U. S. 907 (1951); *Cates* v. *Haderlein,* 342 U. S. 804 (1951); *Door* v. *Donaldson,* 195 F. 2d 764 (App. D. C., 1952); *Pinkett* v. *U. S.,* 105 F. Supp. 67 (D. Md., 1952)) and found that hearings on the validity of mining claims "seem clearly to be within the scope of the court decisions referred to above holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act * * * " (63 I. D. at 345). Accordingly the Secretary remanded the case for rehearing in conformity with the requirements of the APA and directed that the Department's rules of practice governing such cases be revised to comply with the act.

At the time that he signed the *O'Leary* decision, the Secretary signed amendments to the Department's Rules of Practice which became effective upon publication in the Federal Register on October 4, 1956. It reflects credit upon the Department that relatively little change in the regulations which had become effective on May 1, 1956 was necessary. Those regulations had provided for "Field Commissioners" to hold hearings in contests and when directed, in protests. The amendments of October 4 include the substitution of "examiners" for "Field Commissioners" where appropriate; provide for at least 30 days notice of the date a matter is set for hearing; require the examiner to make findings of fact and conclusions of law following a reasonable time in which the parties may submit their findings and conclusions, and a written decision of the examiner to be served upon all parties; and provide that in any case so designated by the Director of the Bureau of Land Management, the examiner shall make only a recommended decision, with the initial decision to come at the Director's level. Now that hearing examiners are necessary for at least a part of the Bureau's adjudicatory processes it is understood that they will be used in all cases in which a hearing under the Rules

of Practice is either required or ordered to be held by the Director. On November 15, 1956, the Bureau announced the appointment of 7 hearing examiners, one each stationed at Portland, Sacramento, Phoenix, Denver and Billings, and two at Salt Lake City.

The Director advises that although no exact record has been kept hearings have been requested in possibly 70 cases, under Sec. 221.6 of the regulations. This provision applies to cases in which a hearing may not be had as a matter of right but may be ordered on specified questions of fact either upon request or upon the Director's own motion. In only one case has a hearing been ordered (decision of November 9, 1956, in *Suntrana* v. *Usibelli and Shallit*) and this has not been implemented because appeal was taken to the Secretary on a number of questions, including the matter of a hearing.

Of the some 70 cases in which a hearing was requested but not ordered it is understood that a number related to land classification action. In these the Bureau has asked for some documentation by the appellant, from an expert, sufficient to raise some question as to the classification action by the Bureau's own people. Such documentation has usually not been forthcoming, the Bureau advises, and the matter has been pushed no further by the appellant. Accordingly, there is yet to be any case in which the discretionary hearing allowed under Sec. 221.6 has been implemented.

The Committee has requested that the Bureau attempt to keep statistics on the cases in which a hearing is either requested or ordered by the Director. An effort might be made in the next year, with the cooperation of the Bureau, to review cases in which a request for hearing figures. Another feature of the new rules which should have continued examination is found in Sec. 221.99 (d) which provides that no decision on appeal or in a contest shall be based upon any document "which is not open to inspection by the parties. . . ." Your Committee considers that this requires the Director to decide appeals only on material which has been open to the appellant. There is some indication that the Bureau does not share this interpretation and believes that the spirit of the rule is fulfilled if the document is made available upon later appeal to the Secretary. If a decision is based on data which an appellant has had no opportunity to inspect and to attempt to rebut if he so desired it is not only basically unfair, but invites appeal to the Secretary thereby increasing unnecessarily the load at that level.

United States Bureau of Mines—Department of the Interior

We indicated in our last report that the Bureau of Mines in administering the Federal Coal Mine Safety Act had not issued any rules or regulations for the guidance of the coal industry.

A new Director of the Bureau, Marling K. Ankeny, took office in the summer of 1956. After consultation with the Office of the Solicitor of the Department of the Interior and on his own initiative, the

Director had prepared a draft of certain regulations which he submitted for comment to the Safety Representatives of the three operators' associations (National Coal Association, Bituminous Coal Operators Association, and Southern Coal Producers Association) and to the Director of Safety of United Mine Workers of America. After discussion with these groups, agreement was achieved on almost all of the regulations proposed and the Director resolved what small conflict remained. On October 12, 1956, December 14, 1956, and March 9, 1957, these regulations were published in the Federal Register.

The new regulations are mainly a codification of interpretations of various terms, used but not defined in the Federal Coal Mine Safety Act, such as "multiple shifts", "abandoned area", "pillar lines", "excessive dust", "unconfined shots" and others. In addition, what constitutes "adequate fire fighting equipment" under Sec. 209 of the Act is now a matter of regulation. The action of the Director in codifying by regulation these areas which had been in dispute since passage of the Act in 1952, is to be commended highly.

The Bureau has recently formulated a new manual of instructions to Branch Chiefs and Federal Inspectors in which is included, among other things, the new regulations. The Director has taken the position that the instructions contained in such manual are mainly housekeeping instructions for the internal operations of the Bureau and should not be made available to the general public. Insofar as these are for the general government of the Bureau and its employees and do not relate to the substantive aspects of inspection, to transmission and analysis of mine atmosphere, and other items of direct concern to the industry, we do not disagree. The Committee, however, will continue observation of the new regulations in practice and will watch in particular for the application of any instructions now considered internal, to the industry as a whole.

Your Committee has previously reported an apparent need for regulations covering (1) inspection, (2) sampling, (3) identification and transmission of samples, (4) analysis by the Pittsburgh Laboratory and (5) appeals to the Director from orders of the inspector. Many of the problems arising from lack of regulations in these areas are illustrated in *Rosedale Coal Co.* v. *Director of U. S. Bureau of Mines,* now on appeal to the United States Court of Appeals for the Fourth Circuit (No. 7425). In that case, following the issuance of a gassy classification order by an Inspector, the Director called a special investigation to be made by one of his representatives which included an inspection of the mine and an inquiry of those present when the sample was taken. He also obtained a written report on the analysis of the sample of mine atmosphere from the Bureau's Gas Laboratory. After receiving these reports he invited the operator to a conference which was attended by the Safety Representative of the three coal operators associations and the Safety Representative of the Bureau of Mines. The Director's special representative recommended that the Inspector's order be annulled because

he had not measured the distance between the roof of the mine and the point where the sample was taken as required by an unpublished Bureau directive. The annullment, however, was not ordered. The operator appealed to the Federal Coal Mine Safety Board, requesting of the Director that copies of the reports referred to be made available. Although the former Director had refused to produce reports of such character, contending they were confidential, Director Ankeny considered the reports should be made available to the appellant. This action, while certainly commendable, illustrates the difficulties appellants can face when procedures are subject to the determination of a long line of successive Directors rather than being made a matter of public regulation.

In view of the fact that much of the subject matter of the Committee's inquiry is before the Court of Appeals for the Fourth Circuit in the *Rosedale* case, it is believed your Committee should await the decision in that case to ascertain if the Court resolves any one or all of the issues relating to inspections, analysis and procedures and be guided accordingly.

United States Forest Service—Department of Agriculture

Introduction

A statement of the scope of the activities of the United States Forest Service, Department of Agriculture, is in order as background for the discussion on procedures to follow.

The Forest Service is the manager of some 160 million acres of National Forest lands lying within the continental limits of the United States. These areas contain about 82% of all Federally-managed commercial timberland. There are 146 National Forests located in 38 States. These lands are subject to such diverse and often conflicting uses as mining, grazing, commercial timber-cutting, watershed protection for domestic water supplies, irrigation and electric power purposes, and hunting, fishing and camping. In some areas, intermingled private land ownership poses problems of ingress and egress and gives rise to controversy over easements, rights-of-way and use permits.

The National Forests were originally reserved from the public domain under the authority of the Act of March 3, 1891, (26 Stat. 1095). They were designated "public reservations" and were, in fact, what the name implies; i.e., not subject to use, sale or other disposal. Six years later the Congress provided for the use and protection of the forest reserves by authorizing the Secretary of the Interior to administer these lands under appropriate rules and regulations (Act of June 4, 1897, 30 Stat. 11). Congress directed that the lands so reserved should be used "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." Provision was made for ingress and egress of actual settlers residing within the boundaries of such reservations and for the development and protection of bona fide mining claims. The use of waters for domestic, mining,

milling or irrigation purposes was made subject to the laws of the State within which the reservation was located or under the laws of the United States. The Secretary was authorized to regulate the use and occupancy and to preserve the national forests from destruction.

In 1905 jurisdiction over National Forest lands was transferred from the Secretary of the Interior to the Secretary of Agriculture (33 Stat. 628). Secretary of Agriculture Wilson at that time appointed Gifford Pinchot as the first Chief Forester with instructions to organize what is today the United States Forest Service. (Letter March 3, 1905, from Secretary Wilson to Chief Forester Pinchot).

Acquisition of lands other than those reserved from the public domain was authorized by a series of laws beginning with the Weeks Act of 1911 (36 Stat. 962), and culminating in the Clark-McNary Act of 1924, (43 Stat. 654). Congress provided for the exchange of privately-owned lands within National Forest boundaries for Federal lands of equal value in the General Exchange Act of March 20, 1922 (42 Stat. 465).

From a single forest reservation of 1,239,040 acres in 1891, the area subject to the administration of the United States Forest Service within the United States has grown to 146 National Forests comprising a gross area of 159,968,757 acres.[1] In the fiscal year 1956, receipts from national forest uses and occupancies were $107,073,157, mostly from the sale of timber on the National Forests. There were an estimated 52½ million recreations visits in the national forests in 1956 for hunting, fishing, camping and sightseeing purposes. There are 200,000 mining claims covering 4½ million acres, and oil and gas leases on over seven million acres of National Forest lands. Some 20,000 stockmen graze almost 4,000,000 head of cattle, horses, sheep, and goats under grazing permits issued by the U. S. Forest Service. The Service is responsible for the management of wildlife habitat populated by wildlife including big game animals estimated at more than 3 million head. Considerable acreages of forest lands have been withdrawn for electric power site purposes and for irrigation and multiple purpose projects. The Service has issued over 55,000 special use permits for summer homes, pipe lines, airports, resorts, stores, telephone lines, saw mills, schools, ski lifts, children's camps, and other diverse uses.

[1] Computed from data furnished by Forest Service.

U. S. Forest Service Procedures

1. Rule Making

As a land management agency exercising proprietary functions, the Forest Service claims exemption from the rule-making provisions of the Administrative Procedures Act. Accordingly, the Service has taken the position that it is not required to abide by any formalities in the promulgation of rules, regulations, policies, standards and procedures, although it has consulted informally with user groups on occasions.

This Committee has taken the position in connection with Interior Department matters that that Department should adopt

the rule making provisions of Sec. 4 of the APA in all of its functions (exclusive of those pertaining to agency management or personnel), when it is a matter of general public interest. The public trust administered by the Forest Service does not appear to vary sufficiently from areas of responsibility of several of the Department of Interior to call for any different treatment.

2. Availability of Information

Generally, as a reference to its activities and practices the Service relies on the information made available in its Forest Service Manual which is understood to contain pertinent excerpts of laws, Secretary's Regulations, Chief's policy pronouncements, organization instructions, and procedures. This Manual consists of seven volumes. It has no proper index but there is a project under way at the present time which involves a complete revision of the manual and a usable index. Questions have been raised as to the ready availability of the Manual to any inquirer and as to whether it is kept currently so as to make it reliable. The Service considers the document open to all. It has been noted, however, that the copies are not available for public inspection at the Departmental Library, the library of the General Counsel or the Department's Public Information Office nor has reference been found in any of the Forest Service material in the Code of Federal Regulations (Title 36, Parts 211-281) to the Manual as the depository of current advices on Service activities and procedures. These deficiencies could readily be cured by action at the Chief's level, which, to quiet any contrary impression, might include a circular to the field directing easy accessibility for all to a copy of the Manual kept in current condition.

The Forest Service makes minimum use of the Federal Register. The Service has published a list of its central and field organization, listing offices and locations to which applications or requests should be submitted; a description of the functions and procedures of each major activity and the general work of the Service; and appropriate references to the U. S. Code, CFR and other sections of the Register for "extension, clarification and authority."[2] The Secretary's Regulations, delegations of authority, land classifications and "all other notices of action having the effect of law" have been published in the Federal Register, according to the Service. This, the Service considers, meets fully the requirements of the Administrative Procedure Act. They also cite the use of newspapers and other news media to keep the public informed of the activities of the Service and assert that they advise individuals and companies through correspondence and personal conferences on changes in management policy, and instructions or procedures affecting individual uses of the National Forest land. Although it is recognized that the Service cannot fully control the data affecting it which will be published in the Federal Register, it would appear that greater use of this publication in connection with

[2] Letter of January 23, 1956, from Chief of Forest Service to Regional Foresters.

"regulations, orders, and notices affecting a class of the public or describing organization, practice, and procedure" [3] is warranted, coordinated with the good efforts being made at dissemination of information through local popular media.

3. Appeals

a. *The Appeals Regulation* (36 CFR 211.2)

The appeals regulation consists of four short paragraphs. It states that "an appeal may be taken from any administrative action or decision" of the officer making it by filing in 30 days a written request for reconsideration or notice of appeal with the officer who made the decision. The appeal may be pursued in turn from the forest supervisor or to the regional forester, then to the Chief of the Forest Service and finally to the Secretary of Agriculture. Under the regulation the officer to whom appeal is made, upon written request, "will" afford the appellant the opportunity to present his case at "a hearing."

On its face the procedure appears fair and simple. A brief inquiry into the recent experience of two appellants, however, and some consideration of what is meant by "a hearing" indicates that the present implementation of those procedures leaves much to be desired.

Case 1 involved an appeal to the Secretary from a decision of the Chief of the Service rejecting an application for permission to strip mine certain national forest lands which had been deeded to the Government with mineral rights reserved. The Secretary appointed a three-man committee to "advise him on appeal," the Secretary choosing one, the appellant a second, the two thus chosen naming a third. We make no expression as to whether such advisory groups, so selected, might be desirable but do observe that if the practice is to be utilized it should be available to all.

Case 2 involved an appeal by a lumber interest from a decision of the Chief to enter into a timber-for-land exchange with another company. The appellant claimed the action deprived him of an opportunity to bid competitively for the federal timber and attacked the exchange as not in the public interest on the allegation that the land was not of equal value with the timber. Appellant asked for a hearing under the appeals regulation but had to file a mandamus proceeding in United States District Court in Washington, D. C., before the Department conceded the point. A hearing examiner was then assigned to the case. Appellant, in seeking to elicit information at the hearing from the Forest Service relating to the decision being appealed, was met by argument of the Departmental attorney who appeared for the Forest Service that the regulation provided merely for an "advisory type hearing" to enable the Secretary of Agriculture to make a "discretionary" type decision. The hearing examiner, after recess, concluded himself that the purpose of the hearing was to afford the appellant an opportunity to present its case and that

[3] U. S. Government Organization Manual, 1956-57, p. 424.

he did not have authority to require an appearance by the Forest Service or that it answer the appellant's interrogatory. He doubted his authority to swear the appellant's witnesses but did so at appellant's request. And finally, even though the Forest Service counsel contended the hearing was "advisory," the hearing examiner in his report, after hearing only one side of the case, concluded:

> "I am not able to submit any proposed findings of fact or proposed conclusion, and although nothing in the demeanor of the witnesses detracted from the weight of their testimony, I am not able to advance any view as to the truth or accuracy of the evidence adduced by the appellant. Also, I do not believe that findings of fact, or conclusions of law, by the presiding officer, are contemplated in this type of proceeding."

The action taken in Case 2 reveals a number of problems in the current regulation. Among these are who may appeal "any administrative action or decision", and, if anyone may, how are they to know *what* the action is, and almost more importantly for appeal purposes, *when* the decision was taken The action of the Forest Service in at first denying a hearing in Case 2 would indicate their belief that only an immediate party to a transaction could appeal a decision. Yet the regulation on this point is wide open. A further problem shown by Case 2 is the futility of holding a hearing if it is to be little more than an interview.

These problems have not gone wholly unrecognized within the Department of Agriculture. A request has been made to Congress this year for additional funds for a hearing examiner to hear cases on appeal to the Chief, with the thought that a full adversary proceeding be conducted to provide a record upon which the Chief would make his decision. There is some indication that such a procedure would be available only to those having or seeking a contractual relationship with the Government.[4] Even so, the advance over the present system would be significant and the efforts in this direction are to be commended. Obviously, however, if the change is to be made some new regulations are required. If hearings upon appeal to the Chief are not to be held in all cases, as your Committee considers should be the case, close scrutiny of the procedures to which "other" appellants will have access will be in order. Further comment in this area must await some further action by the Department. It is to be hoped that the institution of desirable practices will not hinge solely upon whether funds for one additional hearing examiner are granted or denied.

b. *National Forest Advisory Board of Appeals*

On January 17, 1950, the Secretary of Agriculture issued the following memorandum order (No. 1249), which was published in the Federal Register of January 24, 1950:

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[4] See testimony of Ralph Roberts, Administrative Assistant to the Secretary of Agriculture in *Hearings Before House Subcommittee on Agriculture Appropriations for 1958*, 85th Cong., 1st Sess., Part 3, pp. 1311-15.

"There is hereby established the National Forest Advisory Board of Appeals to advise the Secretary on any appeals to him from the decisions of the Chief of the Forest Service involving any public use of the national forests and other lands under the administration or control of the Forest Service. The Board shall be comprised of five employees of the Department of Agriculture to be selected from any agencies within the Department except the Forest Service. A majority of the members of the Board shall constitute a quorum. Upon receipt of a written request to the Secretary of Agriculture from the appellant, the Secretary shall refer the appeal to the Board before which the appellant may appear if he so desires and the Board shall consider the appeal on its merits and furnish its advice and recommendations to the Secretary." * * *

This Board has reviewed a number of cases on appeal and in at least one instance held public hearings in the field. The Secretary's order, however, has never been made part of the Code of Federal Regulations, either under the appeals reguation or otherwise. In addition, there is no repository of the Board's records, opinions or advisory decisions within the Department. It is accordingly difficult to assess just what type of appeal the Board has or will entertain and almost impossible for an appellant to know (and he must make the request) that there is even such a Board open to him.

c. *Other Appeals Problems*

Stockmen who graze livestock under permit on the national forests have, in addition to the appeals procedures referred to above, an alternate method of appealing decisions of local forest rangers, by utilizing the services of local grazing advisory boards.[5]

National forest grazing matters, with heavy emphasis upon appeals procedure, received considerable attention by the Senate and House Agriculture Committees in 1953-55. During the 83rd Congress stockmen sought unsuccessfully to have legislation enacted providing a formal, impartial review procedure within the Department and a de novo court review of final decisions of the Secretary of Agriculture. The original bill relating to grazing appeals, as amended and passed by the Senate, was broadened to include appeals relating to *all* uses and occupancies of the national forests. The House failed to act, presumably because of protests from wildlife, conservation and outdoors organizations representing memberships interested largely in the public recreational use of the national forests. Complaints of these user groups were not aimed entirely at the appeals procedure but rather other provi-

[5] The Act of April 24, 1950 authorizes grazing advisory boards on the national forests. The law established procedures for forming such boards and directs the Secretary to provide for a board's election when a majority of the grazing permittees on a national forest or administrative subdivision thereof petition him. In addition to the relatively few boards established under this law, a much larger number has been created under general authority of the Secretary to regulate the use and occupancy of the national forests. During the hearings referred to in the following footnote, the Secretary conceded the authority he has is broad enough also to establish timber management advisory boards.

sions of the grazing bill. However, some of them felt that the appeals procedure was not needed or that it gave privileged treatment to national forests users whose interest was commercial.[6]

Significantly, the Secretary of Agriculture approved the appeals procedure in the Senate-passed bill, and the Chief of the Forest Service expressed the Department's view thusly:

> "* * * there should be adequate provisions for appeal and review of any authorized occupancy and use of the national forests, and it (the Department) believes that the bills above mentioned would provide a satisfactory procedure. The Department would favor this appeal and judicial review procedure in preference to an arbitration procedure which would in effect assign administrative responsibilities for the management and sale of federal timber resources to an arbitration board. Insofar as we are aware, arbitration procedure of this type has not been authorized for disposal of natural resources."

The bills to which the Chief Forester referred were S. 2548 as passed by the Senate and a similar House bill H. R. 6787. They would have provided for a 3-man advisory board of appeals to review appeals from the Chief's decisions and to make recommendations to the Secretary of Agriculture. One of the members would be appointed by the Secretary, the second by the appellant, and the third by the other two members. The bills would also have authorized appeals to the Secretary on a formal record made before hearing examiners and for review in federal district courts of the record established in the Department.

Notwithstanding the Departmental endorsement of the above legislation and a concession that it now has authority broad enough to establish advisory boards relating to timber management, no change has been made in the Secretary's appeals procedure or regulation since then. The view of the Department was that the grazing bills essentially restated current practice.

The appeals procedure has also been criticized by purchasers of timber during Congressional investigations of federal timber sales activities. The tenor of timber purchasers complaints is that disputes commonly arising over interpretation of involved timber sales contracts necessitate quick, local settlement, which is not possible under present procedures.

In this class of problem a Board of Contract Appeals, so common in other agencies of the Government might well receive some consideration.

d. *Availability of Decisions on Appeal*

The number of cases appealed to the Chief of the Forest Service is understood to be small. The recent testimony before Congress in connection with funds for an additional hearing examiner indicates that

[6] Hearings before Senate Committee on Agriculture and Forestry on S. Res. 127, Grazing policies and Range Improvements on the National Forests, 83rd Cong., 1st Sess.; Hearings before the Senate Committee on Agriculture and Forestry on S. 2548, Administration of the National Forests, 83rd Congress, 2nd Sess.; Hearings before House Committee on Agriculture and Forestry on H. R. 6787, National Forest Grazing Lands, 83rd Congress, 2nd Sess.

about 28 appeals (presumably on contract matters only) are expected in the next fiscal year. It is difficult to assess the volume of appeals because there is no collection of decisions on cases which have been appealed, either at the level of the Chief's office or on the Secretarial level. It is understood that a decision in a particular case will be made available upon request but this is of little assistance to an appellant desiring to comb previous action of the Service to locate parallels with his own particular problem. At the least it would appear that a cumulative, mimeographed collection of decisions on appeal is indicated, with some type of subject matter index.

Conclusions and Recommendations

In view of the foregoing, it is recommended that the Committee on Natural Resources and Interior Affairs conduct a thorough study of the following subjects and take appropriate follow-up action:

1. *Availability of information.* The preliminary survey indicates a need to encourage the Forest Service to expand its informational activities so as to provide all interested parties with full information and pertinent data which directly affect not only business decisions but the public use of the National Forests. This would include ready availability of the Forest Service Manual at all levels of the Service and a workable index to that Manual. In addition, consideration might be given to definition by the Forest Service, through regulation, of the type of information, (a) which will be made available to the public, and (b) information which will be made available only to parties in direct interest. Material which will be made available should be compiled in such form as to facilitate ease of reference and examination. Restrictions on the availability of information should be kept at a minimum.

2. *Compilation of major decisions.* The failure of the Forest Service to publish all of its decisions on appeal, including those of the Secretary on appeal, in readily accessible and usable form deprives interested parties of any useful knowledge of precedents for their guidance in either accepting or challenging action taken in the field. Action appears indicated, through the General Counsel's office and the Office of the Chief of the Forest Service, to urge some form of publication.

3. *Formal appeals procedure.* Little reason appears why appeals taken to the Chief (if not from the local to the regional level) should not be accorded the protection of the Administrative Procedure Act, including the right to a hearing. At the very least, there should be publication of an appeals procedure so that the parties may be advised of their substantive and procedural rights. The Secretary's office has requested additional funds to provide for an additional hearing examiner in the Department to conduct formal hearings on appeals taken to the Chief of the Forest Service. This could indicate some belief that the appeals procedure now used within the Forest Service is not adequate, but

is in any event a salutary step. It is recommended that the Committee follow up the contemplated action and report further to the Section.

For the Committee:

Robert L. McCarty
Chairman

Hugh Fullerton
Vice-Chairman

REPORT OF COMMITTEE ON POSTAL MATTERS

The resolution of the Section at Philadelphia in August 1955, favored legislation, with certain limitations and restrictions, authorizing the Postmaster General to hold and detain for temporary periods the mail addressed to persons attempting to obtain remittances through the mail for any obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, or substance in violation of the Act of August 16, 1950 (39 U. S. C. 259a). The resolution was approved by the Board of Governors of the American Bar Association in October, 1955.

Acting pursuant to the aforesaid resolution, the Committee on Postal Matters drafted a bill which was introduced in the House by Congressman Dowdy of Texas as H. R. 9842, and its passage was favorably recommended with minor technical amendments by the Post Office Department.

The House Committee Report on H. R. 9842 said in part that:

> "This legislation is urgently needed to check the growing use of the United States mails for the distribution of obscenity and pornography * * * it is quite common for persons charged with mailing pornographic materials to openly advertise that their obscene wares are all the more desirable because they have been banned from the mails. Procedural delays provide them with sufficient time to capitalize on this insolent practice. The situation has resulted in a veritable flood of salacious literature, pornography, and other nonmailable articles being sent through the mails to children and adolescents as well as adults."

The action of the Postmaster General in issuing an interim order is not to be subject to the requirements of the Administrative Procedure Act, and is to expire at the end of 20 days unless prior to such expiration the Postmaster General shall obtain an order, from the United States District Court of the district in which is situated the post office where such mail is held or detained, to hold and detain such mail for a further period as the Court shall determine. Among the other provisions are—

> (1) That the person whose mail is held and detained shall have five days in which to appear and show cause why the order should not issue;
>
> (2) That the order of the Postmaster General or of the district court may be dissolved by the Court at any time for cause, including failure to conduct expeditiously proceedings in-

stituted against such person before the Postmaster General with respect to the Act of August 15, 1950, and;

(3) That the person whose mail is detained and held by the postmaster shall have the right to examine said mail and receive such mail as clearly is not connected with the alleged unlawful activity.

The bill was reported to the Senate substantially in the form in which it passed the House, but it was amended on the floor of the Senate by the addition of a Section 2, which provided that the Act should not apply "to mail addressed to publishers or distributors of publications" which have entry as second class matter under the Act of March 3, 1879 (39 U. S. C. 221), or "to publishers or distributors" of copyrighted books and other publications as to which certificates of registration of copyright have been issued under the copyright laws of the United States.

Section 2, which was not sponsored or proposed by the Administrative Law Section, to a large extent defeats the remedy provided for in the first section.

At the meeting of the American Bar Association in Dallas, Texas on August 28, 1956, the Administrative Law Section adopted the following resolution:

"Resolved, That the officers of the Section of Administrative Law are authorized to advise the appropriate committees of the Congress and the Post Office Department of the Section's disapproval of Section 2 of Public Law 821 approved on July 27, 1956, relating to the detention of mail in certain cases."

Suitable action pursuant to the aforesaid resolution has been taken and Bill H. R. 4383, introduced by Representative Dowdy February 5, 1957, proposes to repeal Section 2.

There are a number of other legislative proposals affecting the Postal Service pending before the Committees of Congress which may involve questions of procedure under the Administrative Procedure Act. These proposals are being studied by the Committee on Postal Matters for posible action and recommendation (within the authority of the Committee) to the Administrative Law Section.

The Committee commends the action of the Post Office Department in promulgating procedures governing administrative hearings relating to the denial, suspension or annulment of second class mail privileges, which were published in the Federal Register of January 6, 1956, Volume 21, No. 3, page 105. The provisions are to govern all proceedings under Sections 224, 225, 226, 227, 229, 230, 232, and 233 of Title 39, U. S. Code. The Committee has offered to cooperate with the Post Office Department in voluntarily observing the rule-making requirements of the Administrative Procedure Act with respect to certain other proprietary functions.

For the entire Committee,

Wm. I. Denning
Chairman

Abe McGregor Goff,
Vice-Chairman

Coates Lear
Vice-Chairman

REPORT OF THE COMMITTEE ON PUBLIC CONTRACTS

The Public Contracts Committee this year undertook a comprehensive study in the field of Public Contracts, that is, Construction and Supply Contracts with the United States.

In view of the fact that this study has not yet been completed the Committee will report herein upon the general areas of its study, as well as the present posture of the study.

The areas of study include:

1. Suggested changes in the practices, procedures and powers of Contracting Officers;

2. Suggested changes in present methods of appealing the determinations of Contracting Officers;

3. The question whether Contract Appeals Boards shall be given the statutory status and, if so, should it be within or independent of the agencies whose contracts are reviewed; or should the present less formal arrangement, that is, a Contract Appeals Board appointed by the head of the agency concerned with the contract be maintained;

4. Should such changes as the Committee recommends be accomplished by special legislation, by negotiations between the Committee and the various Boards involved, by a recommendation that the Appeals Boards and/or Contracting Officers be subject to all or a part of the Administrative Procedure Act and the proposed Administrative Code, or by other methods: and

5. Should an educational program be undertaken between the Public Contracts Committee and the various Boards of Contract Appeal in an effort to achieve better understanding and cooperation in the solution of problems in this field.

In view of the comprehensiveness of the study, the Public Contracts Committee was broken down into Subcommittees, with a project assigned to each Subcommittee. Some of the Subcommittees have reported to the Chairman and others are still engaged with their assignments.

After the Subcommittees have all reported, the task of preparation of the final Report of the Public Contracts Committee will have to be undertaken.

The Committee had hoped to complete its work on this study prior to the July Convention but it now turns out that that is not practical. Hence, this Interim Report.

In due time the Chairman of the Administrative Law Section will receive the completed Report of the Public Contracts Committee on the foregoing study, with such recommendations as the Committee considers appropriate.

Bernard J. Gallagher
Chairman

REPORT OF THE COMMITTEE ON SECURITIES

On January 24, 1957, the Securities and Exchange Commission made public a series of proposed amendments to the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940 and the Investment Advisers Act of 1940.

Since it was apparent that many of the proposed amendments would involve principles of administrative practice and procedure which would be of proper concern to the Committee and the Section, copies of the proposals and of the Commission's commentary thereon were secured and circulated to the members of the Committee, with requests for individual expressions of views. Numerous interesting and valuable replies were received, and the Chairman undertook to weave these into a draft report which would then be circulated to the members for consideration.

However, before this could be done the Commission announced that it was in the process of revising its amendment program on the basis of comments received from the public on the original proposals. It was accordingly decided to defer the preparation of the draft report until the revised program should become available for study.

As of the date of this report, the revised program is still being awaited. Arrangements have been made to have the revisions circulated to the Committee members as soon as they are available, which it is expected) will be about the middle of this month.

Respectfully submitted,

CHESTER T. LANE
Chairman

STATE DEPARTMENT MATTERS COMMITTEE

This report relates to Section 1 of H.R. 5612, 85th Cong., 1st Sess., introduced by Congressman Walter on March 5, 1957. This section of the bill proposes to amend the Administrative Procedure Act by adding a new section on Passport Review Procedure.

The provisions of this bill are identical with those of H.R. 9991 of the 84th Congress, which was opposed by the American Bar Association in a statement which appears in the hearings held by the House Judiciary Sub-Committee No. 1, on H.R. 9991 (Serial No. 24, May 10 and 28, 1956, pages 30 and 32). Since the two bills contain identical provisions, it is recommended that the above adverse action of the American Bar Association taken with respect to H.R. 9991 be reaffirmed as applicable to H.R. 5612.

The committee further notes that the Lloyd Wright Commission on Government Security has appointed a sub-committee on Immigration and Foreign Travel, consisting of Louis Rothschild, Under Secretary of Commerce, Congressman William M. McCulloch of Ohio, and Dr. Susan B. Riley of Nashville, Tennessee, which has com-

pleted its study of this problem and submitted its recommendations to the full Commission. Definitive action by the full Commission is expected shortly. Further observations and recommendations may be made by the State Department Matters Committee after it has had an opportunity to study the final report of the Loyd-Wright Commission.

SIGMUND TIMBERG, *Chairman*
STATE DEPARTMENT MATTERS COMMITTEE

REPORT OF TRADE REGULATION COMMITTEE

[NOTE: The Trade Regulation Committee submitted a comprehensive report of developments in the field, much of which dealt with substantive, rather than procedural, matters. The report recommended no Section action and, in view of space problems, your Section Chairman has reluctantly but extensively used the "blue pencil" to reduce it principally to matters of administrative practice and procedure.]

I. Congress and Its Committees

A. *Regulatory agency study.*

The House Interstate and Foreign Commerce Committee has been authorized to make a study of the regulatory agencies and has been given an appropriation of $250,000 with which to start this work. A Special Subcommittee on Legislative Oversight, with Morgan Moulder (D) of Missouri as Chairman has started exploratory work. A subcommittee staff is in process of formation but it is not expected that hearings will begin prior to October. It has been reported that Dr. Walter Splawn, for 20 years a member of the Interstate Commerce Commission, will be top consultant, but the staff director has not yet been announced. The agencies now slated for study are CAB, FCC, FPC, FTC, ICC, and SEC.

* * *

F. *Merger Legislation.*

In May, the House Judiciary Committee formally approved H.R. 2142, the premerger notification bill, following attempts to eliminate two key provisions. The bill, as reported, requires companies with combined assets in excess of ten million dollars to notify the Department of Justice and the Federal Trade Commission 60 days prior to the consummation of any merger. Amendments to eliminate the 60-day waiting period and to remove the authority of the Federal Trade Commission to seek preliminary injunctions were defeated. Added to the bill by the Committee was an exemption of the reporting requirement as to acquisitions of stock or assets of foreign corporations transacting no business directly or indirectly in this country.

G. *Other Pending Legislation.*

[The Trade Regulation Committee also submitted a list of pending bills of interest to its members but recommended no action with respect to any. Some are covered elsewhere in this *Bulletin* in the summary prepared by the National Committee.]

* * *

II. The Department of Justice

Under its new Assistant Attorney General Victor R. Hansen, the Antitrust Division has continued its record of vigorous antitrust enforcement. It is anticipated that by the completion of fiscal year 1957 more than 50 cases will have been filed. Over 100 cases are presently being handled by the Antitrust Division. Specific cases handled within the Division will be considered under special subject designations hereinafter.

III. Federal Trade Commission

Indications are that fiscal 1957 will see a record number of complaints issued by the Federal Trade Commission. Through April 30, 1957, 205 complaints had been issued compared with a 1956 total of 192. By the end of the year the total of complaints is expected to exceed 250, a new record. New procedural rules were adopted by the Federal Trade Commission to become effective May 1957. Special fields in which the Commission is operating will be further discussed under the special subject headings which follow.

* * *

2. Federal Trade Commission.

The following 8 anti-merger complaints brought to a total of 18 Federal Trade Commission actions in this field:

Fruehauf Trailer Co.—Docket 6608.

Vendo Company—Docket 6646.

National Dairy Products Corp.—Docket 6651.

Borden Company—Docket 6652.

Beatrice Foods Co.—Docket 6653.

Erie Sand and Gravel Co.—Docket 6670.

International Paper Company—Docket 6676.

Gulf Oil Company—Docket 6689.

In the Matter of *International Paper Company,* the Federal Trade Commission unsuccessfully sought an injunction in the U. S. Court of Appeals for the Second Circuit compelling the maintenance of the status quo. In denying the Commission's petition, the court expressed disagreement with the decision of the 9th Circuit in the Transamerica case, where the Federal Reserve Board had been granted a temporary restraining order on the basis of the "all-writs" section of the Judicial Code.

C. *Foreign trade.*

An important decision in this area during the past year was the Supreme Court ruling affirming judgment for the government in *Holophane Company, Inc.* v. *United States.* A pending Federal Trade Commission case with great importance in this field is *The Matter of Luria Brothers & Co., Inc., et al.,* Docket 6156, which deals with scrap steel.

The Office of Export Trade of the Federal Trade Commission is initiating a new method of surveillance concerning the business practices of export trade associations. The remodeled plan is to focus fact finding inquiry upon associations in which there appears to be the greatest potential danger. The increasing enterprise among American businessmen to expand and discover new markets abroad coupled

with the complex legal incidents attached to foreign commerce transactions suggests this present course of action for administration of the law by the Commission.

D. *Subpoenas.*

After 43 years, the authority of the Federal Trade Commission to subpoena documentary evidence in proceedings under the Clayton Act was finally established. Following district court decisions which held that the Federal Trade Commission subpoena power under the Federal Trade Commission Act did not extend to Clayton Act cases, the position of the Commission was sustained in the Second (two cases, *Tuttle* and *Rubin*), Fourth (*Menzies, et al.*) and Seventh Circuits (*Reed*), and on May 13, 1957, the Supreme Court denied certiorari with respect to an appeal from the decision of the U. S. Court of Appeals for the Fourth Circuit.

In the Department of Justice a complaint, believed to be the first of its kind, charges the respondents, two corporations and six individuals, with criminal contempt for destroying documents which had been subpoenaed by the grand jury.

E. *Zone pricing.*

In a precedent-making case, *National Lead,* the Supreme Court unanimously affirmed an order of the Federal Trade Commission terminating a zone pricing conspiracy in the lead industry.

* * *

H. *The Niehoff problem.*

In a decision of importance to this Committee, *C. E. Niehoff & Co.* v. *F. T. C.*, decided January 9, 1957, the United States Court of Appeals for the Seventh Circuit, although finding a violation of the Robinson-Patman Act, nonetheless delayed the effective date of the Commission's order until "such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." The court felt that unless the effective date of the order was delayed, "Niehoff's business will suffer economic extinction before the Commission adjudicates upon trade practices of Niehoff's competitors." This question is now before the Supreme Court on certiorari in the *Moog* case, where the Eighth Circuit denied relief granted to the respondent by the Seventh Circuit in *Niehoff*. Certiorari has been sought by the Commission in *Niehoff*.

In *P. & D. Manufacturing Co., Inc.* v. *F. T. C.,* the same Court of Appeals, on April 30, 1957, declined similarly to delay the effective date of an order because of a lack of evidence in the record establishing that the respondent would be forced out of business.

I. *Trade regulations court.*

The Article III Trade Regulations Court recommended by the American Bar Association was energetically debated during the past year on several occasions. A written debate between John Cragun and

Earl W. Kintner appeared in the 25th Anniversary issue of the Federal Bar Journal. Incidentally, your Chairman recommends the entire Anniversary Issue of the Federal Bar Journal for the most interesting reading to date on the subject of the "Growth of the Administrative Process: A Reappraisal." This publication is particularly interesting in that both sides of the picture are presented in the same issue.

Included also under separate cover are the remarks of Earl W. Kintner in debate before the Antitrust Section of the American Bar Association at its annual April meeting. Your Committee regrets that copies of the address of the Honorable Herbert Clark are not available at this time, but it is expected that Mr. Clark's remarks will be published in some future publication by the ABA.

* * *

L. *Compliance activities.*

The Federal Trade Commission's integrated compliance program has continued to develop prompt and effective compliance with the cease and desist orders of that agency. Since July 1, 1956, eleven cases have been certified to the Attorney General for action. A total of 18 penalty cases are now pending.

M. *Insurance.*

In the matter of *American Hospital and Life Insurance Co.*, the United States Court of Appeals for the Fifth Circuit held that the Federal Trade Commission lacks jurisdiction. Another insurance case, *National Casualty Company,* has been argued in the United States Court of Appeals for the Sixth Circuit, but the decision has not been rendered.

N. *Fictitious pricing—Fur Act.*

In the case of *Pelta Furs,* the United States Court of Appeals for the Ninth Circuit upheld a Commission order forbidding fictitious pricing practices. This is the first court test of a fictitious pricing charge under the Fur Products Labeling Act.

O. *Radio-TV broadcast monitoring.*

The Federal Trade Commission has recently issued a series of 5 complaints as a result of the activities of its newly created Radio and Television Advertising Unit (see Newsweek, June 3, 1957, p. 95 for description of this new division which apparently monitors right around the clock.):

American Chicle Company—Product: Rolaids.

Omega Chemical Company—Product: Omega Oil.

Whitehall Pharmacal Company—Products: Infra Rub and Heet.

Mentholatum Company—Product: Mentholatum Rub.

Fidelity Storm Sash Co.—Product: Aluminum storm windows and doors.

P. *Patents.*

Chairman Joseph C. O'Mahoney of the Senate Judiciary Subcommittee on Antitrust and Monopoly has announced completion of the following studies on patents:

"Proposals for improving the Patent System," prepared for the Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights by Dr. Vannevar Bush, distinguished scientist; a study on the "Patent System in the Modern Economy" by Mr. George Frost, a practicing patent lawyer in Chicago; and a study on "Distribution of Patents Issued to Corporations" by the Patent Office under the direction of Commissioner Robert Watson and Examiner in-Chief P. J. Federico.

Q. *Communications.*

Practices of radio and TV networks are being probed by FCC and Congress. In addition, a Justice case charges the Radio Corporation of America and National Broadcasting Company, Inc., conspired to obtain television station ownership for NBC in 5 of the 8 largest markets of the United States by the unlawful use of NBC's power, as a network, to grant or withhold NBC network affiliation. The complaint charges that pursuant to this conspiracy NBC acquired television and radio stations formerly belonging to Westinghouse Broadcasting Company.

Respectfully submitted,

WILLIAM BLUM, JR.,
Chairman.

REPORT OF ADMINISTRATIVE PROCEDURE ACT COMMITTEE

June 5, 1957

The Administrative Procedure Act Committee recommends that the Council adopt the following resolution:

"Resolved that the Council of the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'Whereas, the Administrative Procedure Act (Public Law 404) was enacted in 1946 to establish uniform rules of procedure to govern federal administrative agencies, and

'Whereas, it is the opinion of the American Bar Association that the enactment of legislation not germane to the Administrative Procedure Act as an amendment to said law would impair its effectiveness,

'Resolved, that the American Bar Association opposes the enactment of any legislation not germane to the purposes of the Administrative Procedure Act in the form of an amendment to said Act.

'Further resolved, that the Chairman of the Administrative Law Section or his designee is authorized to oppose the enactment of S. 1933, 85th Congress, 1st Session, or any other legislation in the form of an amendment to the Administrative Procedure Act when the purpose of the legislation is not germane to the purposes of said Act.'"

S. 1933 introduced on April 29, 1957, by Senator Watkins is the only proposed legislation which has been referred to the Committee during the past year. There were no pending matters passed on to the Committee as a carry-over from the preceding year.

S. 1933 would amend the Administrative Procedure Act by adding a new Section to read as follows:

> "Sec. 13. In any case in which an agency which is authorized to exercise jurisdiction over any matter involving the regulation of commerce, or to decline to exercise such jurisdiction, declines to exercise such jurisdiction on the ground that the effect on commerce is not sufficiently substantial to warrant the exercise of such jurisdiction, nothing in any Act of Congress shall be deemed to prevent or bar any agency or court of any State or Territory from assuming and exercising jurisdiction under the laws of such State or Territory over the matter or class of matters with respect to which jurisdiction is so declined."

Our Committee communicated with the author of the bill and requested an explanation of the purpose of the proposed legislation and asked particularly for any comments on the manner in which the bill was considered to be germane to the Administrative Procedure Act.

In reply, the author of the bill explained that its purpose was to close the so-called "no man's land" which resulted from the decision of the United States Supreme Court in the case of *Guss* v. *Utah Labor Relations Board* (March 25, 1957, C.C.H., U. S. Supreme Court Bulletin, Vol. 17, p. 793). The litigation involved in that case arose out of a labor dispute in which the union filed with the National Labor Relations Board charges that the employer had engaged in unfair labor practices. The National Labor Relations Board declined to issue a complaint. In declining to issue the complaint, the National Labor Relations Board stated:

> "Further proceedings are not warranted inasmuch as the operations of the company involved are predominately local in character and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction."

Thereafter, the Utah Labor Relations Board assumed jurisdiction and found that the employer had engaged in unfair labor practices. The Utah Supreme Court affirmed the decision of the state agency. The United States Supreme Court reversed and in doing so stated:

> "We are told by appellee that to deny the state jurisdiction here will create a vast no-man's land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately, both may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's land.

> "Congress is free to change the situation at will. In 1954, the Senate Committee on Labor and Public Welfare recognized the existence of a no-man's-land and proposed an amendment which would have empowered state courts and agencies to act upon the National Board's declination of jurisdiction."

It is this problem with which S. 1933 is concerned. In his explanation of the bill, the author stated:

> "I have become convinced that my bill S. 1723, which amends the Taft-Hartley Act, despite its individual merit, does not stand much chance of passage merely because it amends the Taft-Hartley Act. Therefore, I seek to accomplish the closing of this 'no man's land' through general legislation, since I cannot do it through specific legislation.
>
> "I sincerely hope that by its language the bill does not violate any other provision or unduly encumber the operation of other portions of the Administrative Procedure Act."

The decision of the merit of the substance of this proposal is beyond the scope of this committee. It is apparent from the quotation from the decision of the Supreme Court that there is a problem concerning the respective jurisdictions of the Federal and the State Governments with which Congress may appropriately concern itself. However, it is our opinion that this problem is not germane to the purposes of the Administrative Procedure Act. The proposed legislation is not concerned with the manner in which any federal agency exercises its authority. It is the opinion of our Committee that under these circumstances, it would be undesirable for this legislation to be enacted as an amendment to the Administrative Procedure Act. It would bring within the scope of that Act, legislation which is in no manner germane to its purposes.

The history of legislation similar to this indicates that it is of a controversial nature and might have substantial ramifications as applied to various federal statutes.

Accordingly, the Administrative Procedure Act Committee recommends the adoption of the resolution set forth at the beginning of this report. The resolution has been drawn in general terms because it is the belief of our Committee that the Section should be authorized to oppose in the future any legislation drawn in the form of an amendment to the Administrative Procedure Act if the purpose of the legislation is not germane to the purposes of that Act.

Robert W. Minor
Vice Chairman

C. Robert Mathis
Vice Chairman

John D. Conner
Chairman

REPORT OF COMMITTEE ON HEARING EXAMINERS

Due to the fact that the final draft of the proposed Administrative Procedure Code has not yet been introduced into the

Congress, this Committee has had rather limited matters to consider during the course of this year. The Committee is, of course, concerned with the proposed Administrative Procedure Code in so far as it would affect hearing examiners in their status and functions.

There was submitted to this Committee a bill, H.R. 4921; S. 1550, which sought to amend Section 11 of the Administrative Procedure Act by inserting a provision establishing the compensation of examiners at Grade GS-18 and at the same time establishing the compensation of the Judicial Officer of the Department of Agriculture at the same annual rate as that authorized for the Assistant Secretary of Agriculture under Section 106(a) of the Federal Executive Pay Act of 1956. Inasmuch as this Act or proposal had received the approval of the Board of Governors, it was in line with the ABA policy declarations. The Committee approved the Bill as drafted as being in conformity to ABA policy. One member of the Committee, however, felt that consideration should be given to providing some additional compensation to Chief Examiners. The Committee as a whole, however, did not concur in this suggestion.

H.R. 3350. This Bill was submitted to the Committee for examination and for its comments. The Bill in general provides Title I for the establishment of an Office of Federal Administrative Practice; Title II creates the Office of Hearing Commissioners, provides for their appointment and assignment, qualifications, duties, etc.; Title III of the Act deals with legal career service.

This Committee confined its consideration of this Bill to Title I dealing with the Office of Federal Administrative Practice and Title II entitled Hearing Commissioners. So far as these two titles were concerned, in general, the Bill implements the actions taken by the House of Delegates. The Committee feels that Section 211(b) of this Bill should be stricken and the subject matter of this Section should be dealt with in the proposed Administrative Procedure Code. This sub-section in essence provides that except where otherwise provided by statute or by regulations of the director, the hearing commissioner who presides at a proceeding shall make and file an initial decision which in the absence of an appeal shall become the decision of the agency. It was the view of the Committee that this was a matter having to do with procedures and more properly should be dealt with in the Administrative Procedure Code. Some of the members of the Committee are not in favor of a single grade for all hearing commissioners and are of the opinion that there should be variations.

H.R. 113. This Bill is a Bill to amend Section 11 of the Administrative Procedure Act and from its content is designed as rather a stop gap until such time as H.R. 3350 or some similar Bill can be enacted. It provides that examiners shall be appointed by and for each agency and generally shall be under the jurisdiction of the Civil Service Commission. There is created within the Civil Service Commission the Board of Examiner Administration, to which the authority to select applicants, establish and maintain register of

applicants and to investigate the qualifications of applicants is to be delegated. The Board is authorized to transfer hearing officers from one agency to another, upon application of an agency temporarily overstaffed. The Committee felt that in view of the pendency of H.R. 3350, which deals with an Office of Administrative Procedure and Hearing Commissioners, H. R. 113 should be deferred. It was not felt by the committee that there was sufficient urgency in the situation so far as the hearing examiner problem was concerned to justify urging the approval of H.R. 113. The Committee felt that it would be preferable to deal with this matter in the more comprehensive H.R. 3350.

Several members of the Committee, irrespective of the views of pending legislation and irrespective whether the pending legislation is adopted or not, are of the opinion that this Section or this Committee of this Section, in order to procure as high grade and competent hearing officers as can be had, should take a greater interest in working with the agency which is to have jurisdiction over the appointment of hearing officers in writing the qualifications for hearing officer positions which would lead to the selection and appointment of high grade competent persons. It is the feeling of these members of the Committee that this Section or this Committee of the Section should take as keen interest in the selection and appointment of hearing officers as is taken by the Bar generally in the selection and appointment of the members of the judiciary. Certainly there are matters of considerable moment and importance which are considered and acted upon by hearing officers. It is in the interest of the Bar and the public in general that the hearing officer personnel be competent and of high standing. The Committee at this time has no suggestion as to how this recommendation should be implemented unless it be authorized to confer with the highest authorities in the writing of standards for qualification.

The comments in the foregoing statement are not intended in any way as a criticism of any of the present examiner staff. We believe that in general the present examiner staff are competent and able. However, we do feel that as we seek to improve the quality of judges in our courts, we should also aim toward improvements in the examiner staff, particularly so in view of the more responsible status they are to achieve under the proposed Administrative Procedure Code.

Respectfully submitted,

Reuben Hall, Chairman
Edgar Watkins
Leonard J. Kassel

Separate Report of Earl J. Cox

Earl J. Cox, a member of this Committee dissents from the Committee report with reference to H.R. 3350. In his view, Titles 1 and 2 of this bill do not implement the action taken by the House of Delegates. It is a substantial watering down of the purposes the House of Delegates had in

mind when they adopted the enabling resolutions. The net result of the enactment of this bill would lessen rather than enhance the hearing examiner's independence and efficiency. He is also of the opinion that all hearing commissioners should be of one grade so long as they are hearing and deciding adversary cases. Some hearing examiners now are not engaged in the exercise of strictly judicial functions. Such examiners should not become hearing commissioners and should be exempted from the high qualifications required under the proposed Administrative Code.

Mr. Cox is in accord with the comment of this Committee that interest should be taken in the selection and appointment of hearing officers but feels that hearing commissioner qualifications are plainly stated in H.R. 3350, Section 204. This being so, he sees no reason why this committee should be authorized to confer with anybody with reference to the writing of standards for qualifications of hearing officers.

Separate Report of A. Norman Somers

Pursuant to the suggestion of the National Committee, I am submitting a condensed version of my letter to Mr. Reuben Hall of April 24, commenting on certain aspects of H. R. 3350 (S. 932):

1. *Composition of FOAP.* A multi-membered bipartisan Board is recommended as against a single Director, because it carries greater assurance against partisanship and possibly ill-considered selection and action. It also insures continuity of policy and functioning. These considerations outweigh the factor of expedition, which is advanced in favor of a single Director.

2. *Incumbents.* Sec. 202 should be amended so as to blanket in all present incumbents without limitation to members of the bar. There are an estimated 12 such who have served satisfactorily, and the considerations which underlie the concept of a grandfather clause are as applicable to them as to members of the bar.

3. *Appointment of commissioners.* Sec. 203 should provide for appointment of commissioners "*with the advice and consent* of the agency concerned" instead of merely "*upon consultation* with [it]." This strikes the proper balance between insuring the independence of commissioners, on the one hand, and protecting the agency against commissioners who are unequipped to deal with the specialized problems of that agency, on the other.

4. *Chief Hearing Commissioner.* Sec. 203 should be amended to strike the last sentence providing for the appointment by the FOAP of a Chief Hearing Commissioner for each agency, for the term of a year. In running the agency's calendar and docket, the chief is performing an agency function and the agency should have the power to appoint the person who performs a function for which *it* is responsible. Alternatively, if the provision is to be retained, it should: (a) prescribe that the appointment be with the "*advice and consent* of the agency" instead of "*in consultation* with [it]" and (b) to obviate

the danger of annual politicking, the words "for a term of one year," at the end of Sec. 203, should be deleted.

5. *Tenure.* It is suggested that Sec. 205 contain an additional sentence, at the very end, as follows:

> The regulations shall embrace a retention point system based upon objective standards.

This would tend to insure an equitable and reasonably certain basis for anticipating who would be affected by a reduction in force. It would obviate the controversy and bitterness which, experience shows, flows from selections based in whole or in part on the value judgments or the appraisals made by the selectors.

Sincerely,

A. Norman Somers

REPORT OF COMMITTEE ON IMPROVEMENT OF ADMINISTRATIVE PROCEDURES

Your Committee has considered a number of problems affecting the improvement of administrative procedure before federal administrative agencies. Most of these matters are not now in a sufficient state of development to be reported upon at the present time.

As previously reported by this Committee, the Committee has considered in the past plans for a study of informal adjudicatory procedures before federal agencies. A sub-committee of this Committee, consisting of Dean Vernon X. Miller of Catholic University Law School and Mrs. Fanney Litvin, developed a list of agencies which might be approached on this subject. Your Committee did propose to the American Bar Foundation that the study be sponsored by funds furnished thereby.

At the mid-winter meeting of the Association, the undersigned appeared before the Board of Directors of the American Bar Foundation. Although the undersigned felt that the study project was worthwhile and sufficient information was available for a budget, he was forced to recommend that the subject be placed in abeyance in view of the development within the House Committee on Government Operations. This development was the appointment of a special sub-committee of that Committee to investigate administrative organization, procedure, and practice, with respect to federal administrative agencies. This sub-committee prepared an exhaustive questionnaire on the subject, for submission to all federal agencies. In view of this project, the undersigned was forced to conclude that the proposed A.B.A. study would probably overlap that of the House Committee. For that reason the Board of Directors of the Foundation agreed to place the matter in abeyance, with the understanding that our Committee could come back with a request for funds in the event that a study based on the questionnaire results was in the interests of the Association.

Your Committee has also reviewed a proposal concerning the applicability of the federal lobbying statute to representation of private parties before government agencies. The conclusion of the Committee was that the legislation could not and should not be applied to administrative agencies. A formal resolution on this subject has not been proposed at this time because the matter has not reached a point where action or an Association decision is called for.

Respectfully submitted,

COURTS OULAHAN, *Chairman,*
COMMITTEE ON IMPROVEMENT OF
ADMINISTRATIVE PROCEDURES

REPORT OF COMMITTEE ON JUDICIAL REVIEW

The Committee has considered various bills to extend judicial review to action of particular agencies in the perspective of the revision of the Administrative Procedure Act proposed by the Special Committee on Legal Practice and Procedure. Section 1009 of that revision sought to make judicial review available without the exceptions that presently vitiate Section 10 of the APA. As we understand it, the scheme of Section 1009 is cross-the-board review—no administrative injury without a judicial remedy.

1) The Committee on Judicial Review recommends the following resolution:

"Resolved that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'Be it resolved that the American Bar Association support the enactment of H.R. 272, 85th Cong., 1st Sess., a bill to permit judicial review of decisions of the Administrator of Veteran's Affairs, with a recommended amendment which would substitute review in the appropriate United States District Court for review in the appropriate Circuit Court of Appeals (following the pattern of the Administrative Procedure Act) and that it authorizes the Section of Administrative Law to appear before the Committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.'"

When the Committee considered H.R. 272, it found no reason to depart from the policy of the proposed APA revision. Few are the arguments for exception from review of one agency that cannot be made for every other agency. To postpone action until the revision of the entire APA was enacted might put off veteran's relief for an indeterminate period. Present emphasis on judicial review in a particular area may well prepare the way for consideration of the general extension espoused in the proposed revision of Section 1009. Hence the Committee recommended that support be given to the bill, with an amendment substituting review in the District Courts for that in the Courts of Appeals, following in the path of Section 1009(c) of the proposed APA revision.

2) The Committee on Judicial Review recommends the following resolution:

"Resolved that the Section of Administrative Law recommends that the

House of Delegates adopt the following resolution:

> 'Whereas recent decisions of the Supreme Court of the United States have clarified questions of judicial review under the immigration and nationality laws of the United States, and have construed Section 10 of the Administrative Procedure Act as applicable to deportation and exclusion orders under said laws,
>
> 'Be it resolved that the American Bar Association regards as presently unnecessary any legislation concerned with judicial review under the immigration and nationality laws, that it favors the continued application of Section 10 of the Administrative Procedure Act to proceedings arising under said laws, leaving the matter of further improvement in judicial review to a comprehensive study by Congress of a proposed revision of the Administrative Procedure Act, and that it authorizes the Section of Administrative Law to appear before the committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.' ''

Our Committee was asked to report on H.R. 1258, which would provide for district court review of deportation orders but would restrict review of exclusion orders to habeas corpus. The Supreme Court held in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, that judicial review of deportation orders, other than by habeas corpus, was authorized by Section 10 of the APA. And in *Brownell* v. *Tow We Shung,* 352 U. S. 180 (1956), it held that exclusion orders may similarly be tested under Section 10. Consequently, H.R. 1258, would merely be declaratory of existing law with respect to deportation orders but would represent a step backwards as regards exclusion orders. The Committee concurred with the Committee on Immigration and Nationality that judicial review in this case is best left as is until the APA is revised by the Congress.

Section 4 of the bill merits special consideration. It provides for trial de novo for a person subject to deportation who shows that his claim to United States nationality is not frivolous. That appears to be in harmony with an earlier resolution of the Association, reported at p. 238 of the Adm. Law Bulletin (July, 1955):

> ''Be it resolved that it is the opinion of the American Bar Association that any person whether within or without the United States who claims to be a national shall be entitled to a judicial determination of his claim, and where a Court finds that the action is instituted in good faith and has a substantial basis, he shall be entitled to a certificate of identity to enable him to appear in such proceeding, and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.''

It would appear appropriate under said resolution that the Section recommend to the Congress the enactment of said Section 4. Loss of citizenship is of the utmost gravity and a court should be free to decide that issue unfettered by the ''substantial evidence'' rule.

3) The Committee on Judicial Review recommends the following resolution:

> ''Resolved, that the Section of Administrative Law recommends that the

House of Delegates adopt the following resolution:

> 'Be it resolved, that the American Bar Association support the enactment of H.R. 6829, 85th Cong., 1st Sess., a bill granting to persons in the classified (competitive) civil service the right to a hearing before removal and suspension, and the right to a judicial review of a removal or suspension, and that it authorizes the Section of Administrative Law to appear before the Committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.' "

The Committee could perceive no weighty reason for excluding government employees from the beneficent scope of hearings and extended judicial review. Administrators are notoriously reluctant, even under present easy discharge provisions, to employ discharge proceedings for the purpose of weeding out incompetent or shiftless personnel. But the cure is not to clothe them with the power of a Grand Vizier; it is to promote a vigorous system of administration which will not be satisfied with less than the best standards of performance, coupled with resolute employment of discharge proceedings to weed out the unfit.

The purpose of review—to correct administrative error, to exercise a restraining influence on arbitrary action by affording access to judicial review, and to instill confidence in every man in the fairness of his government are no less applicable to the more than 2,000,000 federal employees than to their fellow citizens. Indeed, if we are to recruit and maintain a career civil service that is worthy of the name, one that will not be shaken by every political wind that blows, we must safeguard the tenure of government servants. We find it difficult to deny judicial review to a fellow American who believes himself victimized by arbitrary or unfair administrative action when even the alien in an "exclusion" case may now have it. *Brownell* v. *Tom We Shung, supra.* A man may not have a constitutional right to be a policeman, but he should not be deprived of the right of fair treatment assured to every other American because he becomes a policeman.

RAOUL BERGER
Chairman

REPORT OF COMMITTEE ON REPRESENTATION BEFORE AGENCIES

The Committe has been primarily concerned during the past year with three major problems affecting the lawyer practicing before administrative agencies:

1. The tendency, usually by statute, to place arbitrary or unreasonable limitations on fees for legal services to be rendered before administrative agencies; and to fail to revise limitations which, though reasonable when the law was enacted, inflation has made obsolete;

2. The requirements, usually by administrative rules, that attorneys be admitted

by special application before practicing before some Federal agencies; and

3. The failure of some Federal agencies to recognize and serve papers and decisions on lawyers appearing on behalf of clients on matters pending before such agencies.

To end the first evil which often results in the loss of the right of representation by counsel, legislation must in most cases be drafted and, what is more difficult to achieve, enacted. The Committee has devoted much effort to acquainting interested bar associations and lawyers with the problem.

The legislation drafted and sponsored by the ABA, S. 932 and its House counterparts—H.R. 3349, H.R. 3350 and H.R. 7006—provide that every participant in an agency matter shall be entitled to be represented by an attorney at law in any matter and only by an attorney in a matter which involves the practice of law (Sec. 401), *i.e.,* representation in any proceeding which involves the preparation of a record which may be subject to judicial review (Sec. 410). They also provide that each representative who is an attorney at law shall file with an independent Office of Federal Administrative Practice (OFAP) a certificate stating that as of that time he is a member in good standing of the Highest Court of any State, Territory, Commonwealth, or possession of the United States, or of the District of Columbia (Sec. 405(1)). It also requires such attorneys to keep information on file up-to-date. If a court disbars or suspends or otherwise restricts such attorney, he must file such information with the OFAP. While every effort will be made to have this legislation enacted, the passage of important laws at best usually takes many years, and bills are subject to amendment and revision, which may impair or delete many desirable provisions. Accordingly, your Committee is endeavoring to secure through existing administrative procedure and agencies such improvements as can be achieved. In all its negotiations, however, it has made clear its support of the ABA's proposed legislation.

Limitation of Fees

The first of a series of resolutions presented by John W. Cragun, the Section's delegate at the 1957 Midyear Meeting of the House of Delegates of the ABA, Chicago, February 18-19, condemned statutory provisions or administrative actions which place arbitrary or unreasonable limitations on fees for legal service to be rendered before administrative agencies. Such limitations, the resolution stated, are in effect restrictions on the right of a party to an administrative proceeding to be represented by counsel, and are against the public interest. The resolution, as adopted, authorized the section to take appropriate action to the end that such arbitrary or unreasonable limitations on fees be removed (43 A.B.A.J. 332, 334 (1957)). The resolution and the report of this Committee last year which was submitted to the House of Delegates in its support have been in considerable demand by committees of various bar associations who are

concerned with the same problem (8 Ad. L. Bull. 137ff. (1956)). Several chairmen and members of such committees have commended the report and indicated their support of the resolution. In the Nation's capital, for example, the headquarters of almost all of the many Federal administrative agencies, the comparable committees of the Federal Bar Association and of the Bar Association of the District of Columbia indicated their support for the ABA resolution and their willingness to cooperate in its implementation.

Recognition of Counsel

On October 7, 1956, the Board of Governors adopted a resolution recommended by the Section of Administrative Law, advocating that "wherever notice or service upon a person or party is permitted or required to be given or made by statute, rule or regulation, good practice requires that notice or service upon the person or party, if represented by an attorney of record, be made upon such attorney representative of the person or party". The resolution expressed the belief that some Federal agencies fail to notice or service attorneys, thereby impairing the fundamental right of persons to be effectively represented by counsel and defeating rights or prejudicing persons in their dealings before Federal agencies and advocated the correction of such practices, either by revision of agency regulations or enactment of appropriate legislation to "provide for notice or service upon his attorney of record in any proceeding or matter before any Department, Commission or Agency of the Federal Government". The Section of Administrative Law was authorized and directed to take appropriate action for the implementation of the resolution.

S. 932, and the companion bills, contain the following provision for notice (Sec. 407):

> "While any participant, other than the United States, or any agency thereof, is represented by an attorney--at-law in a proceeding before an agency, and the fact of such representation has been made known in writing to such agency, no notice or other written communication required or permitted to be given by such agency to such participant shall be deemed to be given: (a) until it has been served on such attorney-at-law (if such participant is represented by more than one attorney-at-law in such proceeding, their service on any one of such attorneys-at-law shall be sufficient), and (b) if any statute or any rule of such agency requires personal service on such participant, until it has also been so personally served on such participant."

Preliminary Action

On January 30, 1957, Donald C. Beelar, the Vice Chairman of the Section, transmitted a copy of the resolution to some 45 Federal agencies, including the Office of Administrative Procedure established in the Department of Justice on December 4, 1956, by the Attorney General. The transmittal-letter requested comments or reply to the following questions:

> "(a) Does the practice or regulations of your agency provide for recognition

of attorneys in conformance with the principles stated in the enclosed resolution?

"(b) What changes, if any, are required in regulations or statutes to enable your agency to give effect to the principles set forth in the enclosed resolution? Please cite regulations or statutes.

"(c) If some change in practice or revision of regulations is believed required, are you disposed to initiate corrective action on this subject?"

The Section's secretary, Mrs. Elizabeth C. Smith, received the replies and then transmitted them to the Committee Chairman. An analysis was prepared by the Committee for the Section's Chairman, Harold L. Russell, for the February meeting of the House of Delegates. Subsequently, in response to a request of J. Smith Henley, Director, Office of Administrative Procedure, Department of Justice, an analysis of all the replies, received from 27 of the 45 agencies, was prepared. At the request of Mr. Henley, the Chairman and the Vice Chairman of the Committee met with him on three occasions to discuss what steps might be taken to improve the practice of several administrative agencies with respect to the admission and recognition of attorneys. In the interim between the first two meetings, the Committee met with representatives of the Federal Bar Association and the Bar Association of the District of Columbia in order to coordinate the activities of the three associations with respect to this important subject. At the second meeting with Mr. Henley, held during the early part of April, the Chairman of the Section Committee invited representatives of the other two associations to join in the meeting with Mr. Henley.

At his request the Committee provided Mr. Henley with an analysis of the replies to its questionnaire, and a list of citations and regulations relating to recognition of attorneys or representatives based on such answers. At one meeting discussions with Mr. Henley centered largely on a discussion of the reasons for some of the provisions of S. 952, including the desirability of a central register of attorneys, a portion of the proposed legislation on which he had expressed disagreement on the ground that this too was an unnecessary expense.

Admission of Counsel

The eleven agencies which require applications for admission and the citations of their rules are as follows:

Rules re Admission of Attorneys to Practice

Board of Immigration Appeals and Immigration & Naturalization Service
8 C.F.R. Part 292

Federal Communications Commission
47 C.F.R. § 1.713

General Accounting Office
4 C.F.R. §§ 1.1-1.6

Interstate Commerce Commission
49 C.F.R. §§ 1.7-1.13

Patent Office
37 C.F.R. §§ 1.341-1.348

Post Office Department
39 C.F.R. §§ 202.1-202.41

Subversive Activities Control Board
28 C.F.R. § 201.5

Tax Court
22 F.R. 278 (Jan. 15, 1957)
Treasury Department
31 C.F.R. Part 10
U. S. Civil Service Commission
5 C.F.R. § 23.4
Veterans Administration
38 C.F.R. § 14.629

The Committee and Mr. Henley are hopeful that approximately half of these agencies may be persuaded to eliminate this requirement. Other agencies, such as the Treasury Department, Patent Office and the Interstate Commerce Commission, will probably refuse to delete the requirement.

Recognition of Counsel

Although the vast majority of the agencies state that they recognize attorneys, a complaint was received with respect to one of these agencies with headquarters outside of the seat of the Government, that its Washington, D.C., office refused to recognize attorneys. This matter is being investigated by the Committee. For obvious reasons it is desirable to have a uniform rule on the recognition of attorneys adopted by all the Federal agencies. There is no sound reason why the performance of such functions by different agencies of the executive branch should differ procedurally. Such a rule should cover both formal and informal proceedings. The Committee presented its views to Mr. Henley on what such a provision should contain, and agreed to review any proposed rule which he might submit.

On May 10, 1957, Mr. Henley transmitted to the Committee and to the representatives from the Federal Bar and District Bar Association two proposals for a uniform rule on the Service of Attorneys, one based on the language in Sec. 407 of S. 932, set forth above, and one based on the rule in use before the Immigration and Naturalization Service (8 C.F.R. 292.11). The recipients were questioned concerning their views on these two proposals. On May 15, Mr. Henley, Mr. Beelar, and the Chairman and Vice Chairman of the Committee met and prepared a proposed rule combining certain features contained in each of Mr. Henley's proposals. The proposal was cleared through, and modified during, consultation with representatives of the other bar groups. The proposed rule reads as follows:

> "When any participant in any matter before [name of agency] is represented by an attorney-at-law and that fact has been made known in writing to the agency, any notice or other written communication required or permitted to be given to or by such participant shall be given to or by such attorney. Where any other method of service is specifically provided by statute, service shall also be made as so provided. If a participant is represented by more than one attorney, service by or upon any one of such attorneys shall be sufficient."

Analysis of Agency Replies to Questionnaire on Notice

Agencies having rules providing for service upon attorneys "of record"

Atomic Energy Commission
Civil Aeronautics Board
with respect to economic proceedings

Federal Deposit Insurance Corporation
Federal Home Loan Bank Board
Federal Power Commission
Foreign Claims Settlement Commission

Agencies following the practice of serving papers upon attorneys

Agriculture
Civil Aeronautics Board
except that in air safety proceedings the rules provide for service of documents upon complainant and respondent

Department of Commerce

except that in some cases, such as export control orders affecting firms in foreign countries, an order or rule is served also on the individual or party involved
Federal Reserve System
National Labor Relations Board
Office of Defense Mobilization
Small Business Administration
Tennessee Valley Authority

Agencies following the practice of serving papers upon attorneys if client requests

Department of Justice
except certain hearings at Federal institutions before the Board of Parole

Agencies intending to embody practice in rules

Office of Defense Mobilization

Agencies willing to embody practices in rules

Department of Interior

Agencies serving both the party and his attorney

Federal Reserve System
Federal Trade Commission
National Labor Relations Board
Securities Exchange Commission

Agencies reporting practices in accord with principles of resolution

Civil Service Commission
Health, Education & Welfare
Indian Claims Commission
Department of Interior
Department of Labor
Department of the Treasury
Railroad Retirement Board
Subversive Activities Control Board

Agencies considering their lack of formal proceedings as making questionnaire inapposite

Export-Import Bank of Washington
Farm Credit Administration
Federal Civil Defense Administration
Federal Mediation and Conciliation Service
Housing and Home Finance Agency
Renegotiation Board
Small Business Administration

Agencies opposed to resolution and refusing recognition to attorneys

Selective Service System

Agencies failing to reply to questionnaire by May 6, 1957

Department of the Air Force
Department of the Army
Federal Communications Commission
General Services Administration
Interstate Commerce Commission
National Capital Planning Commission
Department of the Navy
Post Office Department
Veterans Administration
U. S. Tariff Commission

The Selective Service System reported that neither the practice nor the regulations of the selective service provide for the recognition of attorneys representing registrants and that they were opposed to any action which would authorize such representation on the ground that it would give an undemocratic advantage "to a man solely because he is financially able to hire skilled counsel to represent him," although "all registrants are entitled to advice as to their legal rights" through the Government Appeal Agent in each local board, usually a local lawyers who serves without pay and who is required to be "equally diligent in protecting the interests of the Government and the rights of the registrant in all matters."

The problems arising from permitting administrative agencies to refuse to recognize lawyers who have filed a notice of appearance or its equivalent are detailed in an account in the Journal of the Bar Association for the District of Columbia for January, 1952, in an account of a client who "lost her rights because of the Veterans Administration's failure to recognize her attorney, combined with her inability to understand the legal demands which were made upon her directly. Her rights were apparently only restored because of the complaint made to the American Bar Association". This account was extracted in a memorandum sent to his staff by Whitney Gillilland, Chairman of the Foreign Claims Settlement Commission of the United States on the subject of "Courtesy to be accorded to lawyers".

Citations of Statutes or Regulations Relating to Notice to Attorneys—Based on Agency Answers

Agriculture—7 CFR 1.26 and 4.74; 9 CFR 202.22(b).

Atomic Energy Commission—10 CFR 2.704.

Federal Coal Mine Safety Board of Review—Title 30, Chapter IV, Part 401, Section 401.8.

Federal Deposit Insurance Corporation—Rules, Section 308.2 and 308.14.

Federal Power Commission—Rules, Sections 1.4(a); 1.1(f)(7); 1.17(c).

Foreign Claims Settlement Commission—Part 500 of Regulations, Section 501.3-(c)(4); 19 F.R. 3985.

Interior—43 CFR 221.4, 221.5, 221.6, 221.9, 221.11, 221.12, 221.13, 221.34, 221.35, 221.53, 221.58, 221.64, 221.66, 221.68, 221.69, 221.70, 221.71, 221.76, 221.93, 221.94, 221.95 (21 F.R. 1860, 7622) relate to notice and service in land cases. 43 CFR 4.7, 4.9, 4.13, 4.14 cover notice and service in contract appeals. 25 CFR 81.2, 81.4, 81.13, 81.15, 81.17, 81.18, 81.19, 81.31, 81.32 govern notice and service in proceedings to determine the heirs and probate the wills of Indians.

Justice—500 U.S.C. App. 456(j), Sec. 6(j); 8 CFR, Part 292; 28 CFR 41.5; 28 CFR, Part 2, Sec. 2.16.

Labor—31 CFR, Chapter II, Part 1 (Walsh-Healey Act proceedings).

National Labor Relations Board—Section 102.38 of Board's Rules and Regulations.

Railroad Retirement Board—20 CFR 262.12.

Securities and Exchange Commission—Rule III(a) of Commission's Rules of Practice.

Small Business Administration—20 F.R. 7109.

The *Selective Service System* states that a registrant is forbidden to have counsel before appeal boards by 32 CFR 1624.1(b).

The *Renegotiation Board* states that under its proceedings there is no need to have a lawyer formally appear.

The *Department of Justice* cites Part 2, Title 28, CFR, as the prohibition against having counsel represent prisoners at preliminary interviews in Federal institutions before agents of the Board of Parole.

Respectfully submitted,

THEODORE H. HAAS
Chairman

RUTH SMALLEY
Vice Chairman

REPORT OF COMMITTEE ON ORGANIZATION AND BY-LAWS

The Committee on Organization and By-laws submitted to the Council at the mid-year meeting resolutions proposing to amend Article IV, Section 1 of the By-laws, relating to nomination of officers, Article III, Section 6, relating to filling vacancies on the Council existing by reason of a Council member being absent for two consecutive times, and Article VI, Section 3, which added a provision for the selection of Section Delegate in the event a vacancy occurred in that office.

The resolution to amend Article VI, Section 3, was proposed because the section By-laws contain no provision for the selection of a Section Delegate in the event a vacancy occurs in that office. The Council approved the resolution with amendment. The resolution is submitted to the Section for action. It reads as follows:

> "RESOLVED THAT Article VI, Section 3 of the By-laws of the Section of Administrative Law be amended to read as follows:
>
> *Section 3.* The Council during the interim between annual meetings of the Section may fill vacancies in its own membership or in the offices of Secretary or Section Delegate, and, in the event of a vacancy in both the office of Chairman and Vice-Chairman, then in the office of Chairman. Members of the Council and officers so selected shall serve until the close of the next annual meeting of the Section, except in the case of the Section Delegate,

who shall serve for the remainder of the term.''

The Council considered the resolutions relating to Article IV and Article III, Section 6, and concluded they required further study. Since the resolution relating to nominations involved policy questions, the Council approved a resolution for appointment of a policy committee of three Council members to study the need for revision of Article IV with respect to nomination and election of officers and directed that the committee work in cooperation with the standing Committee on Organization and By-laws, and to make a joint report for timely presentation to the members. The Chairman named J. D. Bond Chairman, and Robert Benjamin and Earl Kintner as members of the Policy Committee.

The Council referred the proposal to amend Article III, Section 6, relating to filling vacancies on the Council existing by reason of a member being absent for two consecutive times, back to the Committee on Organization and By-laws for consultation with the Policy Committee and redrafting. The Committee on Organization and By-laws met with the Policy Committee from the Council on April 13 and May 25, 1957. Resolutions proposing to amend Article III, relating to officers, Article IV, relating to nominations and elections of officers, and Article VI, relating to the duties and powers of the Council, are the subject matter of a joint report submitted by the Policy Committee and the Committee on Organization and By-laws. *Supra*, p. 199.

The subject matter covered in the joint report is broader in scope than the directive of the Council appears to contemplate. However the two committees recognized that in order to carry out the directive of the Council, changes were necessary in Articles III, IV and VI. The committees were in agreement on the matters discussed.

The Committee on Organization and By-laws has at all times attempted to discharge its duties in accordance with the outstanding directives and resolutions of the Council. However, a substantial question exists as to what is the proper function of the committee, and how such committee can best operate effectively. Under a resolution of the Council adopted at the 1954 mid-year meeting in Atlanta, Georgia, the purpose of the committee was set forth to study the structure, function and work of the various committees of the Section, and the Section, and make recommendations to the Chairman from time to time in the interest of correlation of the work of the Section, and when called upon, to serve as a drafting committee for such measures as are necessary for the operation of the Section.

At the same meeting, the Council adopted a resolution requiring that the Committee on Organization and By-laws present a comprehensive report on the organization of the Section with recommendation as to changes, etc., at the mid-year meeting of the Council at least once every two years, beginning in 1954. When the term of officers was changed to one year by amendment to the By-laws in Au-

gust 1954, the Council, at its meeting in May 1955, adopted a resolution to the effect that the Committee on Organization and By-laws present such report every year beginning in 1956.

At the meeting in Philadelphia in August 1955, the Council took under consideration a suggestion of Don Beelar, Member of the Council, to review the present committee structure of the Section with a view of more clearly defining committee responsibilities, and designating new committees when necessary, and to distribute the load being carried by the Section Chairman among the Committees and Members of the Council. At that time, a special committee, consisting of Don Beeler, Rufus Poole, Members of the Council, and Jesse Baskette and Louisa Wilson, then Vice-Chairman and Chairman, respectively, of the Committee on Organization and By-laws, studied this suggestion and reported to the Council on Monday, August 22, 1955. Following the report, the Council approved a resolution abolishing certain committees and approved a resolution relating to the organization of the committees of the Section, subject to study in certain areas.

In December 1955, the Section Chairman appointed a special committee, consisting of John Cragun, Ralph Fuchs, Members of the Council, and Louisa Wilson, then Chairman of the Committee on Organization and By-laws, to study and determine the jurisdiction of various Section Committees with a view of spelling out with some particularity and illustration the permissible scope of activities and fields of interest. In view of the scope of activity of the Special Committee, the Committee on Organization and By-laws has not submitted any formal recommendations as to changes in the committee structure to the Council in either 1956 or 1957.

The Committee on Organization and By-laws believes it is essential that there be a close liasion between the Council and the Committee on Organization and By-laws since matters of policy are involved in drafting and revising By-laws and in defining and redefining the organization of the committees of the Section. To the end that it may operate effectively, it is respectfully recommended that in selecting the membership of the Committee on Organization and By-laws, in the future, consideration be given to placing on the Committee at least three members of the Council. In this way it is believed that the joint committee device may be avoided, duplication of effort spared, and effective operation of the standing committee, under outstanding resolutions, can be assured.

Jesse Baskette

Patricia Collins
Vice-Chairman

Louisa Wilson
Chairman

June 4, 1957

REPORT OF REGIONAL MEETINGS COMMITTEE

The Regional Meetings Committee of the Section prepared and presented programs at the two regional meetings held by the American Bar Association during the 1956-1957 season. The first of these was the Mid-Atlantic Regional Meeting, held in Baltimore, Maryland, October 10-13, 1956. The second was the Mountain and Plain States Regional Meeting held in Denver, Colorado, May 9-11, 1957.

For the Mid-Atlantic Meeting, the Section was given a one-half hour program on radio station WBAL, Baltimore. The Committee developed and presented a program entitled, "Preserving Your Right to a Hearing". This program was introduced by Mr. Arnold Wilkes, Director of Public Affairs and Education for Station WBAL. Donald C. Beelar, Vice-Chairman of the Section, acted as Panel Chairman and Moderator of a discussion participated in by Milton C. Denbo, Bernard J. Gallagher and Robert Sheriffs Moss. The Chairman and the panelists described briefly the nature of administrative hearings and discussed those accorded in the fields of labor relations, public contracts and taxation. Don Beelar did an excellent job of integrating the program and in describing the work of the Section. From all reports, the program was well received. A comment of Mr. Wilkes, after the program had been presented, was indicative. He stated that when the Bar Association first proposed the program, he and his associates had believed that it would be of little interest, but that after hearing it, he thought WBAL's listeners would like to hear a great deal more about administrative hearings and the part played by lawyers in preserving the right to a hearing.

The second meeting in which the Section participated was the Mountain and Plain States Regional Meeting held in Denver, Colorado, May 9-11, 1957. The Section met on May 11th from 9:30 to 12:30 in the morning. Following the meeting a buffet luncheon was served. For this meeting, at which the Chairman of the Regional Meetings Committee presided, the trial of a public contracts case before the Armed Services Board of Contract Appeals was selected for presentation in drama form. The script was prepared by the Chairman of the Committee, assisted by Theodore H. Haas and Gilbert A. Cuneo, Members of the Committee. Advance arrangements were made to secure the witnesses locally, and copies of the script were forwarded to them in advance. Through the cooperation of the Department of the Interior, Grant Bloodgood, Associate Chief Engineer of the Bureau of Reclamation, acted as the Government Contracting Officer, Col. Nesbitt. Associates of the Denver law firm of Gorsuch, Kirgis, Campbell, Walker and Grover also acted as witnesses. Mr. Charles Stoddard acted as Harold Harrison, President of the contracting firm, Ironworks, Inc., Edward L. True acted as the Government Auditor, James H. Crow, and Charles Rhyne (not the President-elect) acted as the Reporter. The program was vigorously rehearsed in

Washington prior to its presentation in Denver. It was rehearsed with the witnesses in Denver for approximately a day and a half before the presentation.

The audience was presented with a statement of facts, a summary of the pleadings, a copy of the pre-trial stipulation and a copy of the Government Auditor's Report which was involved in the case. In the trial of the case, Theodore H. Haas acted as the Presiding Board Member, the Chairman of your Committee acted as Counsel for the contractor, and Gilbert A. Cuneo acted as Trial Attorney for the Government.

The program took about three hours to present and was presented in almost professional fashion, if reports can be believed. It was presented before an estimated audience of 75 persons. The program appears to have been as well attended as any program presented at the meeting. It may be added that considerable interest in membership in the Section was generated.

It is the recommendation of the Committee that the Section continue its active participation in the "workshop" programs of these regional meetings. They stimulate interest in the Association and in the Section. They present a real opportunity for making practical information available to lawyers in all sections of the United States.

The Committee also recommends that future budgets of the Section include an item covering the cost of such meetings. Through the efforts of the Chairman of the Section, members of the Committee participating in the Denver meeting were permitted to register without paying the registration fee. Through the co-operation of the Department of the Army and the Department of the Interior, Messrs. Cuneo and Haas were sent to the Denver meeting, and their expenses were partly reimbursed. The budget should, however, include an amount for partially reimbursing those participants who must pay their own expenses, in addition to an amount to cover the cost of mimeographing of printed matter used in the presentation of programs.

Respectfully submitted,

Regional Meetings Committee
Gilbert A. Cuneo
Bernard J. Gallagher
Theodore H. Haas

Robert Sheriffs Moss, Chairman